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1361 United States

Circuit Court of Appeals

For the Ninth Circuit.

J. J. RAUER,

Appellant,

vs.

GEORGE H. HATFIELD, as Trustee in Bankruptcy of the Estate of A. E. BUCKMAN, Bankrupt, and H. M. WRIGHT, A. E. BUCKMAN, WILLIAM H. CHAPMAN, FILLMORE BUCKMAN, J. A. MEADOWS, SUNSET CONSTRUCTION COMPANY, a Corporation, and J. A. MEADOWS, JOHN McCOY and A. E. BUCKMAN, Trustees of the Defendant, SUNSET CONSTRUCTION COMPANY,

Appellees,

and

J. J. RAUER,

Appellant,

vs.

GEORGE H. HATFIELD, as Trustee in Bankruptcy of the Estate of A. E. BUCKMAN, Bankrupt, and A. E. BUCKMAN, WILLIAM H. CHAPMAN, FILLMORE BUCKMAN, J. A. MEADOWS, SUNSET CONSTRUCTION COMPANY, a Corporation, and J. A. MEADOWS, JOHN McCOY and A. E. BUCKMAN, Trustees of the Defendant, SUNSET CONSTRUCTION COMPANY,

Appellees.

Transcript of Record.

Upon Appeals from the Southern Division of the United States District Court for the Northern District of California, Third Division.

FILED
SEP 25 1923

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

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and

MESSRS. GRANT & ZIMDARS,

Merchants National Bank Bldg., San Francisco, Calif.,

Attorneys for Appellant, J. J. Rauer.

CHARLES S. WHEELER and CHARLES S. WHEELER, Jr., Esqrs., and E. H. WILLIAMS, Esq.,

Nevada Bank Bldg., San Francisco, Calif.,
Attorneys for Appellees.

In the District Court of the United States of America, for the Northern District of California, Second Division.

No. 233—IN EQUITY.

R. CORDS, Jr., Trustee in Bankruptcy of A. E. BUCKMAN, Bankrupt,
Plaintiff,

vs.

A. E. BUCKMAN, J. J. RAUER, WM. H. CHAPMAN, FILMORE BUCKMAN, JOHN DOE MEADOWS, and SUNSET CONSTRUCTION COMPANY, a Corporation,
Defendants.

Bill in Equity.

Plaintiff complains of the defendants above named and for cause of action against them alleges;

I.

That plaintiff is a citizen of the State of California and a resident of the city and county of San Francisco, in said State; that defendants A. E. Buckman, J. J. Rauer, Wm. H. Chapman, Filmore Buckman and John Doe Meadows are residents of said city and county of San Francisco and citizens of said State of California; that defendant Sunset Construction Company is a corporation organized and existing under the laws of the State of California, and has its principal place of business in the city and county of San Francisco, aforesaid. That the true name of the defendant herein designated John Doe Meadows is unknown to plaintiff who begs leave to amend by the insertion of such true name when the same be ascertained.

II.

That heretofore on the 19th day of February, 1915, defendant A. E. Buckman filed in the District Court of the United States for the Northern District of California, sitting as a Court of Bankruptcy, his voluntary petition in bankruptcy, and thereafter on said day was duly adjudged a bankrupt by said Court, and the matter of A. E. Buckman, bankrupt, was [1*] by said Court, referred to Hon. A. B. Kreft, a duly appointed, qualified and acting referee in bankruptcy of said court, for further proceedings. That thereafter on the 9th day of March, 1915, after the notice required by law had been given to said bankrupt and to the creditors of said bankrupt, a first meeting of said

*Page-number appearing at foot of page of original certified Transcript of Record.

creditors was held at the time and at the place specified in said notice, and at said meeting of said creditors this plaintiff R. Cords, Jr., was duly and regularly elected Trustee in Bankruptcy of A. E. Buckman, bankrupt, and thereafter on the 17th day of March, 1915, said trustee filed with said referee in bankruptcy a good and sufficient bond in the sum of \$100.00 as required by law and the order of said referee. That on said day said referee made his order approving said bond, and said R. Cords, Jr., became and ever since has been the duly elected, qualified and acting Trustee in Bankruptcy of A. E. Buckman, bankrupt. That by reason of the residence and citizenship of the parties hereto, and the fact that this action arises under the Bankruptcy Statutes of the United States of America, this Court has jurisdiction hereof.

III.

That defendant Sunset Construction Company was organized as a corporation under the laws of the State of California, on the 12th day of December, 1911; that said corporation was formed and organized by defendant A. E. Buckman for the purpose of carrying on a general contracting and construction business. That said corporation was formed and organized as a cover for the activities and operations of said A. E. Buckman, and for the purpose of concealing the identity of said A. E. Buckman under the form and legal entity and name of said corporation. That said A. E. Buckman immediately became the owner of all of the

outstanding, subscribed shares [2] of the capital stock of said corporation, with the exception of two shares issued, one each, to defendant Wm. H. Chapman, and one J. Maury, for the purpose of incorporation, and said A. E. Buckman ever since has owned all of said outstanding subscribed capital stock, and ever since has completely owned, operated and managed said corporation for his sole benefit. That the organization and formation of said corporation amounted to nothing more, and has amounted to nothing more, than the placing in a corporate form of the capital of said Buckman and his abilities as a general construction contractor.

IV.

That defendant Wm. H. Chapman, is and has been since the formation of said Sunset Construction Company the president thereof, and defendant Filmore Buckman, is and has been since the formation of said corporation the secretary thereof.

V.

That in January, 1914, defendant A. E. Buckman delivered and transferred to defendant J. J. Rauer all of the capital of said corporation, the Sunset Construction Company, owned by said A. E. Buckman; that said delivery and transfer was without consideration and was made by said A. E. Buckman in contemplation of insolvency, and left said Buckman without sufficient funds or property to meet his debts and obligations then due and owing, and was made with intent to hinder, delay and defraud the creditors of said A. E. Buckman

and said creditors were thereby hindered, delayed and defrauded.

VI.

That at some time subsequent to January, 1914, the exact date of which is unknown to plaintiff, said defendant J. J. Rauer delivered and transferred to defendant John Doe Meadows the shares of said capital stock delivered and transferred to said Rauer by said A. E. Buckman, as hereinbefore alleged. That said transfer from defendant A. E. Buckman to [3] defendant Rauer, and from defendant Rauer to defendant Meadows was made as the result of a conspiracy and agreement between defendant A. E. Buckman, Rauer, Chapman, Filmore Buckman, and Meadows to hinder, delay and defraud the creditors of defendant A. E. Buckman and to withhold from them the shares of the capital stock of said Sunset Construction Company owned by said A. E. Buckman, and to retain for themselves the management, operation, benefits and profits of said corporation. That neither said Rauer nor said Meadows paid or gave any consideration whatsoever for said shares but accepted said shares with intent to aid and abet in hindering, delaying and defrauding the creditors of said A. E. Buckman, and with full knowledge of the intent of said A. E. Buckman to hinder, delay and defraud his creditors. That said Meadows now holds said shares upon a secret trust for the benefit of said defendants A. E. Buckman, J. J. Rauer, Wm. H. Chapman, Filmore Buckman, and himself. That said A. E. Buckman, J. J. Rauer, Wm. H.

Chapman, Filmore Buckman, and John Doe Meadows are now, and ever since January, 1914, have been operating and carrying on said corporation and its business for the benefit of each of them and receiving the profits thereof.

VII.

That the estate in bankruptcy of A. E. Buckman, bankrupt, is insufficient to pay or satisfy the claims against said estate, unless said shares of the capital stock of the Sunset Construction Company and the assets of said corporation be subjected to the payment of said claims and considered as part of said estate in bankruptcy. That the verified schedule of said bankrupt filed with his said petition in bankruptcy discloses unsecured debts and obligations amounting to a sum in excess of \$150,000.00 to meet which there are now assets of said estate.

WHEREFORE, plaintiff prays, [4]

1. That he be declared to be the owner, as trustee in bankruptcy of A. E. Buckman, of said shares of the capital stock of the Sunset Construction Company.

2. That it be decreed that the attempted transfer of said shares from said A. E. Buckman to defendant J. J. Rauer, and from said Rauer to said defendant John Doe Meadows be declared null and void and of no force or effect.

3. That said defendants A. E. Buckman, Rauer, Chapman, Filmore Buckman and John Doe Meadows be directed to deliver to plaintiff said shares and the assets, properties, books, contracts of said

Sunset Construction Company, and the management and control thereof.

4. That an accounting be had from said defendants of the assets and profits of said corporation since the month of January, 1914.

5. For such other and further relief as may be proper and equitable, and for costs herein.

THOMAS H. LAINE and
LAURENCE M. PHILLIPS,
GEORGE J. HATFIELD,

Solicitors for Plaintiff.

[Endorsed]: Filed Oct. 27, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[5]

(Title of Court and Cause.)

Answer.

Now comes the defendant in the above-entitled suit and for answer to the bill of plaintiff therein admit, allege and deny as follows:

I.

Defendants deny that the Sunset Construction Company was formed or organized by the defendant, A. E. Buckman, but was organized by its incorporators for the carrying on of a general contracting and construction business, and these defendants deny that said corporation was formed or organized as a cover for the activities or operations of the defendant, A. E. Buckman, or for the purpose of concealing the identity of said A. E. Buckman

under the form or legal entity or name of said corporation.

Defendants deny that A. E. Buckman ever since the formation or organization of the Sunset Construction Company, has owned all of the outstanding subscribed capital stock of said corporation, and deny that ever since said formation or organization he has completely owned or operated or managed said corporation for his sole benefit; and defendants deny that the organization or formation of said corporation amounted to nothing more, or has amounted to nothing more than the placing in a corporate form of the capital of said Buckman, or his abilities, as a general construction contractor.

II.

Defendants deny that in January, 1914, or at any other time or at all, the defendant, A. E. Buckman, delivered or transferred to the defendant, J. J. Rauer, all of the capital stock of said corporation, the Sunset Construction Company, owned by said A. E. Buckman, and defendants deny that said [6] alleged or any delivery or transfer was without consideration or was made by said A. E. Buckman, or at all, in contemplation of insolvency, or left said Buckman without sufficient funds or property to meet his debts or obligations then or at all due or owing, and deny that the same was made with intent to hinder or delay or defraud the creditors of said A. E. Buckman, and deny that said creditors were thereby, or at all, hindered or delayed or defrauded.

Defendants allege that the facts concerning the disposition of any shares of stock owned or controlled by the defendant, A. E. Buckman, was as follows:

On the 15th day of January, 1914, the Sunset Construction Company was indebted to the defendant J. J. Rauer, in the sum of \$20,000.00, for and on account of moneys loaned by said defendant, J. J. Rauer, to the said Sunset Construction Company, and for the better protection and security of said J. J. Rauer for said sum of money so loaned, as aforesaid, the defendant, A. E. Buckman pledged to the said J. J. Rauer, 10,150 shares of the capital stock of the said Sunset Construction Company on said 15th day of January, 1914; thereafter and on the 12th day of August, 1914, the said defendant, J. J. Rauer, sold said 10,150 shares of the capital stock of the Sunset Construction Company to satisfy in part the indebtedness to him of the Sunset Construction Company and said stock was sold for the sum of \$50.00 to H. Wehrle, and thereafter the said H. Wehrle sold and transferred said 10,150 shares of stock to the defendant, J. A. Meadows, sued herein as defendant, John Doe Meadows, and said J. A. Meadows ever since the sale to him of said shares of stock has been the owner and holder thereof.

III.

Defendants deny that subsequent to January, 1914, or at any other time or at all, the defendant, J. J. Rauer, delivered or [7] transferred to defendant, Meadows, any of the shares of the capital

stock of the said Sunset Construction Company, and defendants deny that any transfer of stock to the defendant, Meadows, was made as the result of a conspiracy or agreement between defendants A. E. Buckman, J. J. Bauer, Wm. H. Chapman, Filmore Buckman and Meadows, or any or either of them, to hinder or delay or defraud the creditors of defendant, A. E. Buckman, or to withhold from them, or either of them, the shares of the capital stock of the said Sunset Construction Company, owned by the said A. E. Buckman, or otherwise or at all, or to retain for themselves, or either of them, the management, operation, benefits or profits of said corporation, and defendants deny that neither said Rauer nor said Meadows paid or gave any consideration whatsoever for said shares, and deny that they or either of them, accepted said shares with intent to aid or abet in hindering, or delaying, or defrauding the creditors of said A. E. Buckman, or with full knowledge of the intent of said A. E. Buckman to hinder or delay or defraud his creditors. And deny that said Meadows now holds said shares upon a secret trust or any trust for the benefit of said defendants, A. E. Buckman, J. J. Rauer, Wm. H. Chapman, Filmore Buckman and J. A. Meadows, or either of them. And deny that said A. E. Buckman, J. J. Rauer, Wm. H. Chapman, Filmore Buckman and J. A. Meadows, or either of them, are now, or ever since January, 1914, have been operating and carrying on said corporation and its business for the benefit of each of them and receiving the profits thereof.

In respect to the foregoing and particularly alleging with respect to the affairs of the Sunset Construction Company, these defendants allege that the Sunset Construction Company has owed large sums of money to the defendant, J. J. Rauer, for many years last past, which sums of money have been greatly increasing in amount, commencing with the 9th day of March, 1911, when [8] said defendant J. J. Rauer, loaned to said Sunset Construction Company the sum of \$500.00, thereafter various sums of money were loaned by said J. J. Rauer to said Sunset Construction Company, and at various times balances were struck between said J. J. Rauer and said Sunset Construction Company, and said balances at various times were as follows: On February 1, 1912, said corporation owed to said defendant, J. J. Rauer, the sum of \$15,000.00; on the 14th day of February, 1913, the sum of \$20,734.00; on December 6, 1913, the sum of \$20,000.00; on December 1, 1915, the date of the filing of the bill herein, the sum of \$34,770.94. Also defendants allege that on the 16th day of June, 1914, the Sunset Construction by resolution of its Board of Directors thereunto duly authorized, gave to H. Wehrle, a personal property mortgage covering all the personal property of the Sunset Construction Company to secure the payment of a promissory note dated said 16th day of June, 1914, for the sum of \$5,000.00, and to cover further advances, and said personal property mortgage was duly acknowledged by said Sunset Construction Company on the 16th day of June, 1914, and

said personal property mortgage was accompanied or had attached thereto an affidavit of all the parties thereto to the effect that it was made in good faith and without any design to hinder, delay or defraud creditors, and that said personal property mortgage was recorded on the 3d day of July, 1914, in the office of the County Recorder of the city and County of San Francisco, State of California, in Liber 70 of Personal Property Mortgages, at page 388. And that on the 18th day of June, 1914, the said H. Werle advanced to the said Sunset Construction Company, the sum of \$10,000, which sum was secured by the aforesaid personal property mortgage under the terms and conditions thereof; that the personal property mentioned in the aforesaid personal property mortgage is of the market value of \$5,000.00, or thereabouts, and that [9] said Sunset Construction Company had no other property at the date of the filing of the bill herein, and other than its open book accounts and interests in contracts, said corporation had no other property for a long time prior to the filing of the bill herein, and defendants respectfully represent that said shares of stock of said Sunset Construction Company now owned and held by said J. A. Meadows have no market value and had no market value at the time of the sale thereof by the said J. J. Rauer to foreclose the pledge thereof, as aforesaid.

Defendants further state that besides the foregoing indebtedness of the Sunset Construction Company, there is due and owing to various creditors

of the said Sunset Construction Company on open book accounts large sums of money, and that on the 1st day of July, 1915, an inventory and appraisal of all the assets and property of said Sunset Construction Company was taken and its liabilities ascertained, and a balance was struck under the general heading of Bills Receivable in the sum of \$61,526, and Bills Payable in the sum of \$103,430, leaving a deficit of assets of \$41,904.

IV.

Defendants deny that the estate in bankruptcy of A. E. Buckman, bankrupt, will be aided or assisted in any manner, or that there will be sufficient to pay or satisfy in any manner the claims against said estate, by or through the application or the subjection of the shares of the capital stock of the Sunset Construction Company, or the assets of said corporation to the payment of said claims, and defendants deny that even if said capital stock of said Sunset Construction Company be considered as a part of the estate of said bankrupt, that said bankrupt estate will thereby be enhanced in value to any extent, and defendants deny that there are any assets [10] belonging to the Sunset Construction Company.

WHEREFORE, defendants pray that plaintiff take nothing by reason of this action and that defendants have judgment for their costs herein.

H. M. ANTHONY,
Solicitor for Defendants.

Due service and a receipt of a copy of the within answer is hereby admitted this 23d day of December, 1915.

THOMAS H. LAINE and LAURENCE M.
PHILLIPS and GEORGE J. HAT-
FIELD.

[Endorsed]: Filed Dec. 23, 1915. W. B. Mal-
ling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[11]

(Title of Court and Cause.)

Supplement to Bill and to Answer.

It is hereby stipulated and agreed by and between the parties to the above-entitled action that the bill in said action shall be supplemented by the substitution of the name J. A. Meadows, in said bill, for and in the place and stead of the name John Doe Meadows wherever said name John Doe Meadows appears in said bill; and it is further stipulated and agreed by and between said parties that the Answer of defendants to the bill above mentioned shall stand as their answer to said bill as hereby supplemented.

THOMAS H. LAINE and
GEORGE J. HATFIELD,

Attorneys for Plaintiff.

H. M. ANTHONY,

Attorney for Defendants.

The above supplement is this day ordered filed.

Dated: February 9th, 1916.

WM. C. VAN FLEET,
Judge of Above-entitled Court.

[Endorsed]: Filed February 9, 1916. Walter B. Maling, Clerk. [12]

(Title of Court and Cause.)

Interlocutory Decree.

This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz:

1. That A. E. Buckman at all times, and up to and on the 19th day of February 1915, was the owner of all the issued and outstanding capital stock of the Sunset Construction Company, a corporation, and that on said last mentioned day said stock vested in and became, and now is, the property of R. Cords, Jr., as trustee of the estate of A. E. Buckman, bankrupt.

2. That A. E. Buckman at all times, and up to and on the 19th day of February 1915, was the owner of the Sunset Construction Company, a corporation, and of all of the property, books, and records of said company and that on said last mentioned day said company, property, books, and records vested in and became, and now are, the property of R. Cords, Jr., as trustee of the estate of A. E. Buckman, bankrupt, and that said property be held by said Cords pending an accounting between said company and defendants A. E. Buckman, J. J. Rauer, Filmore Buckman and Wm. H. Chapman.

3. That defendants A. E. Buckman, J. J. Rauer, Filmore Buckman, and Wm. H. Chapman severally

account for all moneys or property received by them from, or advanced by them to, defendant Sunset Construction Company since the 12th day of December, 1911, whether such transactions were made in the names of third persons or in the names of said parties, for the purpose of determining what claims, if any, exist between said company and said persons.

4. That for the purpose of taking said above-mentioned accounting said cause be referred to H. M. Wright, Master in [13] Chancery of this Court, to take and examine said account and report thereon to this Court.

Dated September 11th, 1916.

WM. C. VAN FLEET,

Judge of the District Court of the United States for
the Northern District of California.

[Endorsed]: Filed and Entered September 11, 1916. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [14]

(Title of Court and Cause.)

Stipulation and Order Substituting George J. Hatfield as Plaintiff for and in the Place of R. Cords, Jr.

It is hereby stipulated and agreed that R. Cords Jr., plaintiff above named resigned as trustee in bankruptcy of A. E. Buckman on the 15th day of January 1917 and that George J. Hatfield was thereafter appointed, and now is, the duly appointed,

qualified and acting trustee in bankruptcy of A. E. Buckman, bankrupt.

It is further stipulated and agreed that George J. Hatfield, as trustee in bankruptcy of the estate of A. E. Buckman, bankrupt, is the successor in interest of all of the interest of R. Cords Jr., in the above-entitled and numbered suit and that said Hatfield may be substituted for and in the place of said Cords as plaintiff in said suit and that this stipulation may be used in lieu of a supplemental bill in said suit.

H. M. ANTHONY,

Attorney for Defendants.

THOMAS H. LAINE,

Attorney for R. Cords Jr., Trustee, etc.

IT IS ORDERED that George J. Hatfield, trustee in bankruptcy of the estate of A. E. Buckman, bankrupt, be and he is hereby substituted as plaintiff in the above-entitled and numbered suit for and in the place of R. Cords, Jr.

Dated May 5th, 1917.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed May 5, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [15]

(Title of Court and Cause.)

Order Continuing Master's Authority.

The above cause having been heretofore referred to H. M. Wright, then Standing Master in Chancery of this court, and his final report not having been

filed; and said officer having resigned his said office on December 31, 1919; now that no question may arise as to his authority to complete said hearing and make his final report therein:

IT IS HEREBY ORDERED that said cause stand referred to said H. M. Wright as a Special Master in Chancery from the date of his said resignation until the completion of his duties, with the powers and directions contained in the original order of reference herein.

Dated, January 31st, 1920.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Feb. 2, 1920. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [16]

In the Southern Division of the District Court of
the United States in and for the Northern Dis-
trict of California, Second Division.

No. 233—IN EQUITY.

GEORGE J. HATFIELD, Substituted for
R. CORDS, JR., as Trustee of the Estate of
A. E. BUCKMAN, Bankrupt,
Plaintiff,

vs.

A. E. BUCKMAN, J. J. RAUER, WM. H. CHAP-
MAN, FILLMORE BUCKMAN, SUNSET
CONSTRUCTION COMPANY, a Corpora-
tion et al.,

Defendants.

Master's Report on Accounting.

By the interlocutory decree of this Court entered September 11, 1916, it was decreed that on the 19th day of February, 1915, A. E. Buckman was the owner of all the capital stock of the Sunset Construction Company and that on said date, the stock vested in his trustee in bankruptcy; that likewise, on that day, Buckman was the owner of the company and all of its property, books and records and that on the date of adjudication in bankruptcy, as stated, such property vested in the trustee. The defendants, A. E. Buckman, J. J. Rauer, Fillmore Buckman and William H. Chapman were ordered to severally account "For all moneys or property received by them from or advanced by them to defendant Sunset Construction Company since the 12th day of December 1911, whether such transactions were made in the names of third persons or in the names of said parties, for the purpose of determining what claims if any [17] exist between said Company and said persons." The accounting mentioned was referred to the undersigned as Master in Chancery of the Court "To take and examine said accounts and report them to this Court."

On May 14, 1917, upon motion of Thomas H. Laine, Esq., then attorney for the plaintiff, the Master made his order directing A. E. Buckman, J. J. Rauer, Fillmore Buckman and William H. Chapman to file with him their respective accounts as required by said decree. The order is herewith separately returned. A. E. Buckman and Fillmore

Buckman have never complied with said order for the reason, it may be presumed, that the books of the Sunset Construction Company had been taken into the possession of the trustee in bankruptcy; but the filing of said statements has never been pressed by attorneys for the trustee. Defendant William H. Chapman filed his account in the form of an affidavit which is also separately returned. Chapman was the president and a director of the Sunset Construction Company, but these were nominal offices and his connection was really that of attorney for said company and said A. E. Buckman. The account shows no indebtedness by Chapman to the trustee at the date of bankruptcy and I so find. The principal accounting defendant was J. J. Rauer. In due course, he filed a statement of account which, for identification in these proceedings has been marked Exhibit 1. At the first hearing, he filed also a document called a statement in explanation of the account which has been identified as Defendant's Exhibit 2. During the proceedings, pursuant I think to the Master's order, said Rauer filed what is entitled "Amended and Supplemental Statement of J. J. Rauer on Accounting" and which was marked as Defendant's Exhibit 3. These three statements are also separately returned. [18]

On Monday, October 29, 1917, I was attended by Edwin H Williams, Esq., as attorney for the trustee, and H. M. Anthony, Esq., and Milton J. Green, Esq., as attorneys for the defendant Rauer. Later in the proceedings, Charles S. Wheeler, Jr., Esq., also appeared as attorney for the plaintiff; and

hearings were had October 29, 30, 31, November 2, 6, 8, 16, 30, and December 6, 1917. Proceedings were stenographically reported and a transcript thereof in two volumes is herewith separately returned. Thereafter briefs were filed as follows: By the plaintiff on May 4, 1918; by the defendant on November 7, 1918, and by the plaintiff in reply on February 18, 1919. Said briefs were separately returned. Thereafter by stipulation of counsel for all parties, the hearings were reopened for further testimony, which was had on March 1, 3 and 10, 1920. A transcript of said testimony is also separately returned. During the proceedings a large number of books of account, checks and other documentary material was received in evidence and are separately returned. A list of said exhibits is annexed to this report. They do not bear consecutive exhibit numbers. The said transcript of testimony together with said exhibits and the exhibits in the main case, and the briefs of the parties have furnished all the evidence upon which this report is based. I also return certain objections in writing filed by plaintiff to the first account of defendant Rauer hereinabove mentioned.

A word should be said with regard to the delay of one year since the submission, in rendering this report. The reason is reflected in the extended time that counsel took to file their briefs (as the dates of filing indicate) namely, the extreme complexity of the facts and the obscure nature of the evidence from which the facts were derivable. I realized when the case was submitted [19] that many

weeks of solid time would be necessary to dispose of this matter and form intelligent conclusions and consequently it has been necessary to delay until that time was available. I may say that in an experience of over ten years as Master of this Court, this has been the most difficult case that has come before me so far as the determination of the facts is concerned. Many things have brought this about. Neither the Sunset Construction Company nor the defendant Rauer kept adequate books of account. The transcript of testimony is frequently obscure. The witness Rauer did not confine himself to clear answers to questions, but volunteered much that was not pertinent, thus destroying the orderly presentation of the facts. The briefs lack specific references to the pages of the transcript. The statements filed are confused, misarranged and not at all complete. Transactions that are pertinent to this hearing and transactions not pertinent are all included and a sifting out process has been necessary. It was a work which, for the best interests both of the trustee and of the defendant Rauer, required the services of a skilled accountant to assist the Master in his determination, but no such help was forthcoming. The witness Clark, offered by Rauer as an expert accountant is evidently nothing more than an ordinary bookkeeper and a very partisan one at that. The bulk of the testimony and of the briefs has, of course, increased the difficulties. The presentation in the briefs, however, has been done in an orderly fashion and I shall follow that order in my report.

The facts necessary to an understanding of the accounting may be briefly stated. The Sunset Construction Company were contractors for grading and street work. A. E. Buckman owned all its stock and was the general manager; Chapman was the president; [20] Fillmore Buckman was the secretary. Defendant J. J. Rauer is a private money lender of San Francisco, who began lending money to Buckman or his *alter ego*, the Sunset Construction Company, in 1911; continued to do so during the period up to Buckman's adjudication in bankruptcy on February 19, 1915, and thereafter until Buckman's death about 1918 or 1919. Either in ignorance or disregard of the fact that the Sunset Company should not be dealt with after Buckman's bankruptcy as if it were an independent unit, Rauer kept on lending it money and collecting its accounts assigned to him, applying them indifferently to obligations before and after the bankruptcy date without regard to the rights which have been proven by the interlocutory decree to exist, of other creditors of Buckman and of the company.

It is obvious that the trustee for Buckman is not interested in any new business done by Buckman or the company, whether with Rauer or others, after the adjudication in bankruptcy on February 19, 1915. We have, first, therefore, to find the state of the account between the company and Rauer on that date. The trustee is also interested, however, in the later collection of assets of the company existing on the date of bankruptcy, and in the profitable enjoyment of any of its property. The disparity

between the parties is indicated by the fact that by the original brief, the trustee claims as due from Rauer to the company, \$23,332.75, which is increased in the supplemental brief by \$12,316.01, making a total of \$35,648.76, while Rauer on the other hand claims that there is due to him from the company, according to his first account, \$39,318.18 and according to his amended account, page 6, \$36,807.04, a sufficiently striking difference and one which illustrates the difficulties of reaching a conclusion in this matter. I may say now that the best I can do is to reach results approximately correct. [21] In this case, more than the usual one, the established practice of this Court whereby Masters' reports are first announced in draft, will be found useful in order that errors by the Master, if they exist, may be pointed out.

It is well to state at the outset that I have found it impossible to use either of defendant Rauer's accounts as a basis for the account to be taken here and correcting that basis by charging and surcharging particular items. The account covers transactions down to 1917 with which we are not concerned, in this respect, to be sure, following the terms of the decree and of the Master's order. Furthermore, both of the statements of account are vitiated by extensive omissions. I have, therefore, used the statements only as assistance and have followed the plaintiff in going to the original transactions and the evidence thereof as disclosed in the books and papers of the parties and their testimony in regard thereto. I have followed the plaintiff in taking a

so-called statement of account between the Sunset Construction Company and Rauer on March 15, 1915, something less than a month after the bankruptcy, as a starting point, stating a balance due to Rauer from the Sunset Company of \$28,874.82. This statement was made under oath by Rauer, in a petition filed in this Court in the Matter of the Bankruptcy of Buckman, for leave to foreclose a chattel mortgage. It was included, likewise under oath, in an affidavit on file in response to an order to show cause, where the matter is referred to there as an account stated. It is immaterial whether the account was stated or could be stated between Rauer and Buckman without the concurrence of the trustee and the Referee in Bankruptcy. It is sufficient that it is an admission under solemn oath. Moreover, it is corroborated in some degree by one of the Sunset Construction Company's [22] books, a little gray memorandum book kept by Fillmore Buckman, showing the number of outstanding checks not collected. It was the practice of Rauer to take evidence of his loans chiefly in the form of checks which he presented for payment when funds were on hand and often surrendered to the company in return for a new check, treating them as if they were promissory notes. On page 172 of this book is contained a list of outstanding checks marked "J. J. R." (meaning J. J. Rauer) which totals the sum of \$28,192.50, varying from the stated account by \$682.32. It is in evidence that this sum was arrived at by Rauer, Mr. Anthony, his attorney, and one or both the Buckmans after going over the

checks of Rauer and of the Sunset Construction Company. I shall, therefore, take it as a fact that on March 15, 1915, the Sunset Company owed Rauer the sum stated namely, \$28,874.82, according to Rauer's then contention. It does not follow that this result is to be finally accepted as correct.

To bring this result to the date of bankruptcy, February 15, 1915, I have gone through the cash book of the Sunset Construction Company and taken the items paid to and received from the defendant Rauer between that date and March 15th. They are as follows:

1915

Feb.	24	Paid, J. J. Rauer to D. F. Cramer for stock hire in ad- vance	\$ 200.00	
	24	Recd., J. J. Rauer.....	\$ 245.00	
Mar.	1	“ “ loan	30.00	
	2	“ “ “	200.00	
	5	Paid, J. J. Rauer ...	355.00	
	8	Recd., J. J. Rauer loan	300.00	
	8	Paid, J. J. Rauer to D. F. Cramer, for stock hire	704.96	
	8	Paid, J. J. Rauer ...	300.00	
	12	Received, J. J. Rauer, loan	75.00	
				<hr/>
		Forward	\$1559.96	850.00

Forwarded\$1559.96 \$ 850.00

1915

Mar. 12	Paid, J. J. Rauer, checks taken up and interest	865.00 127.90 15.00	
15	Reed., J. J. Rauer..		175.00
15	Paid, interest on \$2000.00	400.00	
	Loan	175.00	
	Difference in ex- change in checks	69.59	

Totals\$3212.45 \$1025.00

Deducting \$1025.00 received from \$3212.45 paid to him gives a balance of \$2187.45. Deducting this sum from \$28,874.82 brings the state of the account on February 19, 1915, to the sum of \$26,687.37 due Rauer on that date. This, therefore, I take as the starting point of the accounting. From this starting point I shall pass on certain claimed deductions by the trustee from this balance.

Trustee's Claimed Deduction of Interest on Debt of Said Sunset Construction Company. The date December 12, 1911, referred to in the interlocutory decree is the date of the incorporation of the Sunset Construction Company, which was in existence at the date of Buckman's bankruptcy. Prior to that, however there had been another company of the same name, likewise owned by Buckman, to whom Rauer

had loaned moneys beginning in March, 1911. It failed, apparently by inadvertance, to pay its corporation license tax to the State of California and its corporate existence was accordingly terminated by executive proclamation. The second Sunset Construction Company was then formed to continue the business. At the time of its dissolution the first Company owed Rauer something less than \$15,000.00 for which he held its note. It also owned a number of parcels of real estate, most of which were in the name of William H. Chapman, its President. The minute book of the second corporation shows that a resolution was passed by the directors authorizing [24] the issuance of ten thousand (10,000) shares of its capital stock to the directors of the first corporation as trustees in dissolution, and the assumption of all the liabilities of the first corporation in consideration of a transfer by those trustees to the second corporation of all of the assets of the first. There is no transfer of those assets in written form in evidence. Furthermore, the stock book shows that only the shares to qualify directors were ever issued. The ten thousand shares to the directors of the first corporation were made out, signed by the President, but not signed by the Secretary nor sealed with the corporate seal or ever formally issued. On March 7, 1912, Chapman conveyed to Viola Clark, a niece of Rauer, and his dummy in this transaction, by deed absolute four parcels of land, two of them twenty-five feet in frontage and two, one hundred feet in frontage, being ten lots in all. In May, 1912, Viola Clark and the Sunset Con-

struction Company joined in a mortgage of these four parcels and a fifth of one hundred feet frontage, the grantor of which lot is not clear, to John R. Stroud as mortgagee to secure the payment of \$9000.00 with interest at the rate of 7% per annum. At the same time an instrument in the nature of a defeasance was executed, which was received in evidence under the stipulation of the parties, after the conclusion of the hearing. This instrument was executed by the second Sunset Construction Company, sealed with its seal, by Viola M. Clark and by William H. Chapman. It recited that "The Sunset Construction Company is now indebted to J. J. Rauer in the sum of \$15,000 or thereabouts, on a promissory note for money loaned by the said J. J. Rauer to the said Company"; that Chapman was an endorser of said note; that the parties had on that date executed a note to Stroud for \$9000.00 and given as security a mortgage upon five parcels of land; that there were certain existing liens of \$1600.00 more or [25] less on the fifth parcel of land described in the mortgage and it was thereupon agreed that from the said sum of \$9000.00 borrowed from Stroud, the liens would first be paid and the balance paid to Rauer on account of the promissory note of \$15,000.00. The Sunset Construction Company and Chapman agreed to pay interest on the promissory note of \$9000.00. Viola M. Clark agreed to convey to Chapman, or his nominee, the said five parcels of land free and clear of all liens except said mortgage securing \$9000.00 and liens of taxes (which the first parties agreed to pay)

“Whenever the full sum of \$15,000.00 will have been paid to the said J. J. Rauer.” During the succeeding years interest on the note of \$15,000 to Rauer was regularly charged and paid by the second Sunset Construction Company to Rauer at the rate of $1\frac{1}{2}\%$ per month until a date in 1913 when the rate was raised to 2% a month. The interest on the Stroud mortgage was also paid by the Sunset Company. In addition to the security of the lots in the name of Clark, Rauer also had certain assignments of claims including one against the Taylor Estate. This latter claim was personally collected by him in July, 1915, after the bankruptcy, in the sum of \$1500.00 and is credited by him on the balance due. In December, 1915 (erroneously stated in the Amended Account as 1916) Rauer agreed with Buckman that the Company's equity in the property mortgaged was worth \$6000.00, which sum was credited on the account and is apparently acceptable to the trustee. Rauer thereupon traded the property to one, Ducas, in return for certain real estate on Fulton Street in this City, which he likewise vested in the name of another relative, Mrs. Wehrle. On this state of facts, the trustee claims that the lots were taken by Rauer in the name of Clark in settlement of the debt and not as a mortgage; and, secondly, that the agreement of the Sunset Construction Company to assume the debts of the first [26] company was without consideration since the evidence shows no transfer of assets of the first company. The trustee also relies on the fact that the deed to Clark was absolute in form

and certain testimony of Mr. Chapman on the stand that his understanding was that it was taken in full settlement. He also stated, however, that his recollection was not clear on this point and I lay no stress upon it in view of the fact that the Company for years paid interest on this debt and on the debt to Stroud. It seems to me that it sufficiently appeared that the assets of the first company were transferred to the second company and that the agreement of May, 1912, was a valid one. So far as the first company's real estate was concerned, it was in the name of Chapman, no conveyance was necessary and he acted as if the equitable interest was in the second company by conveying to Viola Clark in March, 1912, and at the same time signing an instrument acknowledging the Company's debt to Rauer. So far as the Company's equipment in the nature of grading machinery was concerned, this could be transferred by manual delivery and, in fact, must have continued as before under the control and management of Buckman. As a matter of fact, the same evidence which induced Judge Van Fleet to hold that the second company was merely a dummy corporation, of Buckman himself, would induce to the same conclusion as regards the first Sunset Company. The claim of the trustee as regards this matter takes practical form in a demand that there should be deducted from the balance due as stated, all the interest which was paid to Rauer on the \$15,000.00 note and to Stroud on the \$9000.00 note, amounting in all to \$16,024.38 for principal and interest items.

For the reasons given, this deduction will be denied.
[27]

Deduction of \$7500.00. As stated above, it is admitted by all parties that the Sunset Company's equity in the lots mortgaged to Viola Clark for Rauer was, after bankruptcy, liquidated at \$6000.00, and the assignment of claim against the Taylor Estate was paid in the sum of \$1500.00. This total sum of \$7500.00 is, of course, not represented in the account stated as of March 15, 1915, or in the figured balance of February 19, 1915. Deduction for \$7500.00 must, therefore, be allowed.

Usurious Interest. It is in evidence that Rauer charged the Sunset Construction Company interest at the rate of $11\frac{1}{2}\%$ per month up to March 11, 1913, and thereafter interest at the rate of 2% per month. In addition to that whenever a loan was made it was his custom to charge them what he called a "discount" which was nothing more nor less than a bonus or extra compensation for making the loan. Furthermore, since his practice was, in determining the amount of the new checks, to include unpaid items of interest and discount as well as principal, there resulted a compounding of interest, the amount of which, however, cannot be determined. The trustee refers to the California Statute entitled "An Act to Define Personal Property Brokers and Regulate their Charge and Business" approved April 16, 1909, Amended in 1911. In brief, this bill defines a personal property broker as one who takes as security for a loan any chattel mortgage, or who engages in the business of loaning money, taking as security therefor any lien on or

assignment of wages, salary, income or commissions. The defendant's reply is devoted to a denial of the trustee's claim that Rauer's business was within the Act. I have no question that he was a personal property broker as defined in the Statute. It sufficiently appeared in the evidence [28] that he was engaged in lending money to others as well as to the Sunset Construction Company. It also appears that during all this period he took assignments from that Company of contracts for grading work and of moneys to become due thereunder. It seems to me that such assignments covered "income" as mentioned in the Act.

The trustee points out (Opening Brief, page 15 and following) that the rate of interest charged, exclusive of discount charges was $11\frac{1}{2}\%$ per month to March 11, 1913, and thereafter at the rate of 2% per month; that prior to June 3, 1913, when an account was opened by the Company with the Merchants National Bank, there is no way aside from Rauer's admissions of segregating the interest charges from the principal sums, but that commencing with that date down to February 19, 1915, the date of bankruptcy, separate checks were drawn and cashed for interest, none of which checks included either principal or discount. He then shows by a list of the checks that at least the sum of \$12,279.65 was paid to Rauer on the admitted interest account after June 3, 1913. The brief says: "The foregoing statement shows that the Sunset Construction Company paid Rauer at the rate of about

\$600.00 per month on the sum of all outstanding loans. Moreover, it shows conclusively that Rauer received during the period commencing June 3, 1913, far more than the 2% per month admitted by him." He also submits a list of discounts shown on the face of the account, amounting to \$1493.50, and also a list of additional discounts in the sum of \$1462.00, which, however, by subsequent stipulation, was cut in half at \$731.00. He then comments on compounding of interest without drawing any specific results therefrom. His conclusion is that since by the statute loans by a personal property broker whereby more than 2% per month is charged are declared not valid, it is open to the Court in this [29] accounting to reduce the rate of interest to 7% per annum under Section 1917 of the California Civil Code fixing that rate where there is not "An express contract in writing fixing a definite rate." By a computation shown on pages 2 and 3 of the original Closing Brief, after making allowances for interest otherwise deducted, the trustee takes seventeen twenty-fourths of the result, thus allowing 7% and reaches a final claimed reduction of \$8806.05.

I find myself unable to agree with the trustee either in his conclusion as to the effect of the Statute or in his claim that there is a demonstrated usury on the facts stated. The statement that a total sum of \$12,279.65 demonstrates on its face that it represents more than 2% per month does not seem to me to be self-evident for the obvious reason

that in the method adopted, by me, following the plaintiff of stating this account by deductions from a later admitted correct account, I cannot know the balance due at any particular time during the period after June 3, 1913. Whether any individual payment of interest or a total for a period is usurious depends, of course, on the amount of the principal upon which the payment is made. Furthermore, I do not agree that the Statute warrants us in reducing the rate of interest to 7% per year. Section 4 of the Act approved April 16, 1909, as amended April 21, 1911, reads as follows:

“No contract of any kind or nature made by any personal property broker which comes within the scope of business as set forth in Section 1 hereof, or which in any way involves any security given to secure the performance of such contract, shall be valid or of any force, virtue or effect, either at law or in equity, if there is therein or thereon directly or indirectly charged, accepted or contracted to be received or paid, either in moneys, goods, discount, or thing in action, or in any other way, a greater benefit, rate of discount, or interest than the rate of two per centum per month; and if a greater benefit, rate of discount [30] or interest than two per centum per month is directly or indirectly advanced or paid upon any such contract as is in this section designated, the excess above the said rate of two per centum per month so advanced or paid may be demanded and recovered by the

person or his legal representatives or assigns who advanced or paid the same from the person or corporation either to whom or for whose use or benefit such payment or advance or any part thereof was made."

To my mind this means, first, that as to any executory contracts where it is proved, as it doubtless could readily be proved in most of the instances of loans by Rauer to the company, that a discount or bonus was paid in addition to the stipulated rate of 2%, the contract of loan would be invalid and Rauer could not recover. Where, however, as here, the transaction has been executed and the excess over 2% per month has been paid, the remedy is that the excess can either be recovered back by action under Section 4, or deducted in an accounting proceeding such as the present. In other words, the Statute makes 2% a month the legal charge in such cases as this, refuses to enforce an executory contract for a greater rate, and when executed gives a remedy for the excess. Such transactions as this are full of risk and to my mind would plainly not be compensated by an allowance of 7% per annum and the Statute so recognizes. I conclude that Section 1917 of the Civil Code does not apply and that I must credit the trustee only with the proved excess over 2% a month. It is not evident to me, as I have stated, that any part of the \$12,279.65 constitutes an excess over 2% a month and the only excess that is allowable is made

up of the items of discount or bonus paid while the 2% rate was in effect. These are the items of

April 1, 1913.....	\$111.00
June 3, 1913.....	15.00
Sept. 5, 1913.....	40.00

Total.....\$166.00

plus the stipulated discounts of \$731.00, or a total of \$897.00. [31] The latter sum will be deducted.

Deduction of \$1440.00 and Interest. This represents a plain bookkeeping error by Rauer, which I will not discuss fully, as it is fully and adequately explained in the plaintiff's brief. Rauer received and collected certain demands against the City, charged them twice and credited the same only once. The interest on this amount from July 20, 1913, to March 16, 1915, was paid in the amount of \$561.60. Interest to February 19, 1915, would be \$547.20. In my calculation above which was roughly adapted to bring the balance stated on March 15, 1915, to February 19, 1915, I did not include interest items and the former figure should therefore be used here. Deduction will be allowed, therefore, in the sum of \$2001.60.

The matters remaining grow out of transactions between the Sunset Construction Company and Rauer subsequent to the date of Buckman's bankruptcy, February 19, 1915. As I have stated, that company continued doing business and its relations with Bauer continued exactly as if no bankruptcy of Buckman had occurred. Collections were made upon contracts completed before bankruptcy.

Some of the money was either collected by or immediately turned over to Rauer. The moneys received were applied by him not only for current interest, but in cancellation of loans and the application was indifferently made to loans prior to the bankruptcy date and to loans subsequent thereto. The grading equipment of the company, upon which Rauer had a chattel mortgage not legally foreclosed until December 7, 1916, was sometimes used by Rauer himself, sometimes rented to others and the rent collected by Rauer, and sometimes used by the Sunset Construction Company on contracts assigned to Rauer. In [32] disposing of these matters I have followed the following principles which seem to me to represent good law:

1. Any money due the Sunset Construction Company on February 19, 1915, which can be traced into the hands of Rauer whether applied by him on indebtedness prior to bankruptcy date or subsequent thereto have been charged to him in reduction of the indebtedness at the date of bankruptcy;

2. Where collections were made by Rauer after bankruptcy and applied in reduction of indebtedness prior to the bankruptcy, I have followed his application of funds and have reduced the account as stated on February 19th by that amount. If those moneys were subsequently arising assets of the Sunset Construction Company, it is Rauer's misfortune that he applied them on prior debts. The funds have been so mixed by him and there are so many items of doubt and so much in the

evidence to show that more of the prior assets of the Company have been received by Rauer than can be here traced that I have felt justified in assuming that his application of collections in satisfaction of checks dated prior to bankruptcy and held by him is to be followed as a correct application of the proceeds;

3. Rentals collected or earned for use of the mortgaged equipment have been charged against Rauer for reasons hereafter more fully explained.

Collection of \$8040.60 on account of Fourteenth Avenue paving. On page 10 of the credit items in Rauer's original statement of account, Exhibit 1 herein, will be found a list of collections in 1915 and 1916 made by Rauer on account of a contract concerning Fourteenth Avenue between A, B and C Streets, the total amount of which [33] is \$8040.60. As regards this money Rauer's position is that it represented a paving job done after bankruptcy. The trustee's position is that it represented a grading job completed by the company before bankruptcy. There is no question that the grading job was completed before bankruptcy, its final acceptance by the Board of Public Works occurring on January 22, 1915. On that date the voucher book of the company shows that bills were sent out to various persons aggregating in amount \$6712.80 (the trustee's brief erroneously states this amount at \$5293.80, omitting a bill sent to Hyman, voucher 2239, in the sum of \$1419.00). The trustee says that the names on the bills coincide substantially with the names on page 10 of the

account and he concludes that the entire collections for this grading work have been traced into Rauer's hands. At the expenditure of considerable labor, I have traced this matter through the cash books, the so-called "black" book and the gray book of the Sunset Company and I find that the trustee's conclusion has been too readily reached in accordance with his wishes. A number of these bills were collected by the Sunset Company before the bankruptcy and the checks therefor either cashed, deposited to their account or transferred to persons other than Rauer. There follow the payments for grading proved to have been received by Rauer and applications of money whether for grading or for the subsequent paving made by him on account of obligations prior to bankruptcy.

On February 10, 1915, there was due and collected by Rauer two warrants on the city and county of San Francisco in the total amount of \$990.00 for which he surrendered checks of the Sunset Construction Company, unpaid, of dates prior to the bankruptcy. This credit is not shown in Rauer's account.

On March 11, 1915, the cash book and the black book show [34] that Rauer collected other bills against the city and county for grading Fourteenth Avenue in the sum of \$495.00 and applied this, together with other collections, the date of whose origin with reference to the date of bankruptcy is not shown, in taking up checks of the Company dated both before and after bankruptcy. I there-

fore charge him with the amount of the application to prior checks, a total of \$665.00.

On May 20, 1915, check in payment of a bill against one, Webb, one of the bills above mentioned for grading, was received and endorsed to Rauer in the sum of \$137.50. I charge this collection to him.

On May 31st, check of Hyman for \$750.00; on May 24th, check of the same person for \$250.00 were endorsed to Rauer and applied in payment of checks issued after bankruptcy. The testimony of Hyman and a receipt in evidence show that Rauer also received from Hyman on June 4, 1915, a payment of \$500.00 on account of this grading contract which is not shown either on the books of the Sunset Company or on Rauer's account. I charge him accordingly with \$1500.00 thus received from Hyman.

On May 25, 1915, a check from Dufau for grading Sunset Avenue in the amount of \$20.00, check of Rider for \$306.70 and check of Meyer for \$3148.04 were turned over to Rauer. The Dufau check, as stated was for grading. It is possible that part of the Rider check was for grading, although not certain, and likely that part of the Meyer check was for grading done prior to bankruptcy. In return for this money Rauer extinguished obligations by a surrender of checks dated prior to February 19, 1915, in the total amount of \$2830.50 and I charge this sum to him in accordance with the principle stated. On May 22, 1915, the Sunset Construction Company transferred to Rauer [35] a check from Sol Getz & Sons described as "Account 14th Avenue" in the amount of \$1043.36. Getz is not among the persons to whom grading bills appear to

have been sent. I do not know whether the bills cover work done before or after bankruptcy. Rauer, however, surrendered one check in the sum of \$400.00 dated prior to bankruptcy along with others subsequent thereto and I accordingly charge him this sum of \$400.00. On June 3, 1915, the Sunset Company transferred to Rauer a check from Getz for \$521.38, one to E. Jordan, \$83.75 and one from Gardizer for \$160.00, against which Rauer cancelled checks issued prior to bankruptcy in the total amount of \$800.00. I accordingly charge him this amount.

The total of deductions, therefore, which I make in connection with the trustee's claim that this amount of \$8040.60 should be charged against Rauer amounts to \$7323.00.

Claimed Deduction of \$2624.25. The trustee lists these items on page 4 of the appendix to the Final Brief as collections subsequent to bankruptcy admitted on the face of Rauer's account. They are taken from pages 5 and 6 of the Amended Account and consist of the following:

1915.

July 5	C. Sutro.....	\$320.00
Dec.	J. D. Welch.....	100.00

1916.

Jan. 29	Profit balance on contract Lawton & 45th.....	422.50
July 19	Profit balance on Whittell contract	568.05
July 3	Profit balance on contract with Carolán	182.95
Jan. 31	Profit balance on McKenzie con- tract	219.50 219.50

1915.

July 9	Reese	150.00
July 12	Gessler	81.25
July 31	Phillips	600.00

[36]

There is no question but what these collections are admitted by Rauer, but there is nothing in the evidence known to me to prove that they arose prior to bankruptcy. Obviously if Buckman or the Sunset Construction Company did work for Sutro, Welch or the other individuals after bankruptcy, it would be shown in the Rauer statements of account since they cover the period subsequent to the bankruptcy, but they do not constitute an admission that they concerned business of the Sunset Company prior to the date of bankruptcy. So far as the contracts are concerned, it is true that large contracts existed with Carolan, for instance, and maybe with the others, prior to the bankruptcy but work was also done subsequent to the bankruptcy. There is nothing before me to show that any of this money applies to the pre-bankruptcy period. If they were unfinished contracts, the trustee had an election to be exercised within a reasonable time, whether he would complete the work or not. Since the election was not made until long after the contracts were completed, I do not feel inclined to assume that the election would have been made and I see no reason in the present state of the proof why these profits should be allowed to the trustee. The deduction claimed of \$2624.25 is, accordingly, denied.

Miscellaneous Collections. The briefs disclose several small collections shown on the face of

Rauer's account, which I conclude were assets of the Sunset Construction Company on the date of bankruptcy and charge them against Rauer without extended discussion, as follows: [37]

Academy of Sciences.....	\$ 300.00
Reeder & Foster	407.20
Bosworth	500.00
Iverson	500.00

\$1707.20

RENTAL OF EQUIPMENT FOR TARAVAL STREET CONTRACT.

This was a job of grading in March, 1916, done by Rauer on his own account, upon which certain equipment belonging to the Sunset Construction company was used. This brings up the question of the chattel mortgage on the equipment given to Rauer by the company in June, 1914, to secure a note for \$5000.00 and future advances. There will be found in the briefs a great deal of discussion of the law and the facts, much of which seems to me unnecessary. The chattel mortgage is in evidence and covers certain named equipment and any other personal property of the company. It was accompanied by the necessary affidavits and was recorded. It contained a clause allowing the mortgagee to take possession after default. The notes were payable on demand and since there was a continuing balance of indebtedness, it is probable that default occurred at an early date. Rauer took possession of the equipment for use on the Taraval Street job as early as March, 1916. The chattel mortgage in question and the accompanying notes were made to H. Wehrle, a brother-in-law and dummy of Rauer.

On July 22, 1916, a complaint was filed in the State Court whether in claim and delivery or foreclosure, is uncertain. The certified copy of the decree entered by consent on the day after the filing of the complaint recites promissory notes in the sum of \$15,000.00, the giving of the chattel mortgage, the delivery of the property under mortgage to the plaintiff in the interval between the filing of the suit and the decree on the following day, the present indebtedness on the notes in the sum of \$10,000.00 and that the personal property secured by the mortgage was of the value [38] of \$7500.00. Then follows a decree "That the plaintiff have, recover and retain the possession of all the above-described personal property and that the defendants be credited the sum of \$10,000.00 on the \$15,000.00 secured by said chattel mortgage, leaving a balance in favor of the plaintiff in the sum of \$2500.00." The ambiguity in the decree as to the balance due is obvious, but it would appear that it was intended to recite that \$5000.00 had been paid on the notes prior to suit and that the property was taken in for \$7500.00, leaving a balance of \$2500.00. The trustee in bankruptcy was not joined. In August Rauer exercised dominion over the property by giving Buckman an option to purchase the property at a stated figure by the application of rents for the use of it. In September, 1916, the interlocutory decree in the present case was granted virtually setting aside the sale in the Superior Court by decreeing that all the property of the Sunset Construction Company was the property of Buckman and had vested in his trustee in bankruptcy. Thereafter Rauer filed his petition in this Court in bankruptcy, asking leave to fore-

close the chattel mortgage. It was foreclosed and on December 7, 1916, the property was sold to another admitted dummy of Rauer for the sum of \$3701.60 and the money impounded in Court.

Since the mortgage provided that the mortgagee might take possession, Rauer was entitled to do so at any time after default.

CIVIL CODE 2927.

Such a taking of possession would not, however, foreclose the mortgagor's right of redemption. Neither did it entitle Rauer as the mortgagee to collect any rentals upon the mortgaged property or to make use of it for his own benefit.

First National Bank vs. Erreca, 116 Cal. 81.
[39]

Any possession he might take was only for his further security. Rentals collected by the mortgagee during his possession, however acquired, and the value of the use of equipment by him on his own work is, therefore, chargeable against him in favor of the mortgagor and the trustee in bankruptcy. Counsel for Rauer makes claim for certain expenditures upon the equipment. These are denied for two reasons: First, expenditures for the benefit of mortgaged property will not be allowed where the holding of the mortgagee is adverse to the mortgagor as is here evidenced by the option given to Buckman; and second, for the reason that the proof is indefinite as to the time of the expenditures and the total amount thereof.

The trustee claims that the rental value of this equipment on the Taraval Street job was \$475.00 per month and that its use was from March until

January of the following year. The evidence seems to show that while the final acceptance of the work did not take place until January, the equipment was taken off the job after three and one-half months' use. From what the evidence shows as to the equipment in use and the rental value thereof, I find that a reasonable rental would be \$375.00 a month for a period of three and one-half months, or a total of \$1313.50, which will be charged against Rauer in favor of the trustee.

Miscellaneous Collections of Rent. Rauer collected rental for the use of this grading equipment by others as follows:

Hutton, included in statement of account,	
under date Aug. 1916.....	\$ 927.00
Items, not included in account, but shown	
in statement of account rendered	
Buckman	1300.00
Rent from Morgan Improvement Co.....	159.13
Scrap iron sold.....	75.00
	<hr/>
	\$2461.13

[40]

Trustee's Claim for Reasonable Rental Value Between July 1 and December 1, 1916. The Trustee claims that he should be allowed \$3867.37 for reasonable rental value of the equipment between July 1, 1916 and December 1, 1916. He claims that the total rental value of the equipment during this period from the evidence was \$7251.50, from which he deducts the amount claimed by him for use on the Taraval Street job and the amounts of rentals collected from Hutton and others. The theory of this

claim is that whether the property was in fact used or not, Rauer having taken possession must account for the value of its use. It seems to me that the cases cited by the trustee may be distinguished on the ground that the possession taken was unlawful. Here Rauer had a right to take possession for his security, but not to use the equipment. If his possession was lawful, I see no reason why he could not store it unused. The claim for reasonable rental value is denied.

Claim of the Trustee Arising from Contract With the Federal Construction Company. The facts under this matter are briefly as follows: About December, 1914, being thus before the bankruptcy of Buckman, certain oral contracts were entered into between the Sunset Construction Company and the Federal Construction Company, three in number. The principal one concerned some work on San Bruno Avenue; the other two were minor jobs for street work on Twenty-first Avenue and on "B" Street. All of these contracts had been let by the city to the Federal Construction Company. On the San Bruno job the terms of the arrangement between the two companies were that the Sunset was to furnish the necessary equipment and the superintendence of Buckman and the Federal was to furnish the necessary money. The profits, if any, were to be divided equally and losses, if any, were to be borne by the Federal Construction Company. Similar arrangements [41] were made as to the minor jobs excepting that the Sunset Company was to have 40% of the profits and bear 40% of the losses. The San Bruno Avenue job was begun

about March or April, 1915, and was completed in January, 1916. Officials of the Federal Construction Company testified that Buckman's superintendence was only nominal so that the Federal had to send out its own superintendent on the job and that all the necessary equipment was not furnished by the Sunset since the Federal had to hire a steam shovel. Difficulties arose as to a settlement under the contract and there are in evidence stop notices filed by Rauer, to whom the Sunset contract had been assigned in June, 1916, with the Auditor of the City and County of San Francisco. One of these stop notices contained the following language: "The claim of \$12,000 is for the foregoing rental, use and consumption of equipment and material used in the grading and sewerage of San Bruno Avenue between Oakdale Avenue and Galvin Street." Nothing is said about Buckman's services as superintendent. On or about August 12, 1916, a settlement was had between Rauer and Buckman on the one side and the Federal Construction Company on the other. This settlement is represented in Rauer's statement of account by the item "August 12, 1916, J. Dowling, \$8409.80." Dowling was the president of the Federal Construction Company. In the opening brief, the trustee's claim against Rauer in connection with this subject matter was confined to this sum of \$8409.80. The supplemental hearing produced further evidence and the trustee makes claim in additional amounts increasing his claim to \$10,828.31.

The trustee claims that Rauer must account for any moneys traced to his hands. It seems to me

that the trustee's [42] position must be upheld on either one of the following theories:

(1) An executory contract of the Sunset Company in existence at the date of bankruptcy, which was in its nature transferable (and this was transferable since it was later assigned to Rauer) must be held to be one which the trustee had an election to adopt within a reasonable time. It was, however, a concealed asset which no amount of diligence on the trustee's part would discover and it was not discovered until this accounting, long after the contract had been completed and settlements made. It was a contract which the trustee in bankruptcy would readily have adopted upon notice of it, since it involved no expenditures by him and no possibility of loss. Rauer's counsel objects that Buckman was not compelled to give his services after bankruptcy to the trustee and that the value of those services rightfully belonged to Buckman and were assignable by him to Rauer. The answer to this is that we do not know whether Buckman would have given his services if the trustee had adopted this contract, since both Buckman and Rauer concealed the facts; and, furthermore, the terms of the assignment are not in evidence. The effect of this, like other transactions where Rauer made collections of the Sunset Company's assets, was that he thus secured a preference over other creditors existing at the date of bankruptcy.

The second theory upon which the trustee's demand for these moneys seems to be justified, has relation to what has been said heretofore about the rental for the use of the Company's equipment.

This was a contract in which the consideration given by the Sunset Company was its equipment and Buckman's services. If the evidence in this case had shown the reasonable value of [43] Buckman's services, it would be possible to consider whether such an amount ought not to be deducted from the moneys received by Rauer. There is no such evidence that I have discovered. It is in evidence that at the same time he was doing other work. (Transcript, 485.) It is also to be considered that the withhold notice makes no mention of the services as part of the foundation of the claim. There is thus a confusion of moneys which it was incumbent upon Rauer to resolve to my satisfaction by evidence. In the absence of such evidence, no credit will be given for the value of Buckman's services.

It will be impossible to detail in this report all the figures in the computation which I have made. I refer to the transcript of the final account concerning the settlement, taken from the books of the Federal Construction Company headed "A.E.B.," to page 21 of the supplemental brief of Rauer's counsel, to the transcript of the journal entries in the books of the Federal Construction Company. From these sources and from the testimony, together with Rauer's statements in evidence, reinforced by the concessions of the defendant's counsel as to amounts received by Rauer, and concessions by the trustee's counsel as to amounts for which he should *received* credit, I have reached my results.

I may say that the trustee's counsel is not entirely clear as to the manner in which the figure above

referred to of \$8409.80 is reached. This appears on page 5 of the credits in Exhibit 1 in the following entry:

“August 12, 1916, J. Dowling, \$8409.80.”

The detail of this given in the transcript from Rauer's ledger, page 66, at an unnamed date after July 3, 1916, is as follows: [44]

Dowling, etc. \$7139.62; unpaid Asst. 21 & 22 & B, \$1145.18; Anthony, \$125.00. The total of these items is \$8409.80. The transcript of the ledger of the Federal Construction Company shows that the first item was a check made on August 12, 1916, described as “Cash in full J. J. Rauer of all account.” The \$125.00 item was a bill against Anthony for street work done by the Federal Company, assigned to Rauer in lieu of cash. The item of \$1145.18 refers either to unpaid assessments or unpaid assignments of account similar to the above for street work on the streets named, made by the Federal Company to Rauer. The sum is made up of the following items shown on the ledger sheet of the Federal Construction Company:

1916

Sept. 29	Amount collected by Rauer	
	from Seashore Realty Com-	
	pany	\$544.50

1917

April 14	Cash, J. J. Rauer.....	292.05
April 30	Josephine Dillon account as-	
	signed to S. C. Co. and J. J. R.	287.75
30	Diff. of acct.....	20.88

\$1145.18

Rauer says that as part of the settlement, he took bills for collection, some of which were collected and some were not and were returned to the Federal Company. The ledger account discloses that on September 29, 1916, he collected \$544.50 and that in April, 1917, being the date apparently when unsuccessful collections were returned, he took a collection against Dillon as cash and credited the item of \$292.05 and since he acknowledges a credit in full, what must be deemed a cash item of \$20.88 to settle the transaction. In other words, the trustee's error is that he charges the item of \$292.05 against Rauer twice and does not [45] charge the item of \$20.88.

The transcript of the ledger sheet of the Federal Construction Company headed "A. E. Buckman" concerning these three jobs shows on the credit side an item of cash paid by Rauer, rental for cars used by the Federal on still another job, *pro rata* shares of profit on two of the jobs, charges against the Federal for team hire paid by Rauer in part on the San Bruno job and in part on other jobs, and other bookkeeping entries; on the debit side it shows that the account was balanced in part by payments to the Sunset Company, in part by charges against that Company for paving work on Fourteenth Avenue and other charges, in part by payments to Rauer and in part by assignments of claims against others made to Rauer and collected by him.

Rauer's counsel, page 21 of his supplemental brief acknowledges receipt by Rauer from the Federal Construction Company, including the Fourteenth

Avenue paving and numerous other items, in the total amount of \$17,216.49. I take these concessions as a starting point. In addition, he must be charged with the receipt of the following items shown in the transcript of the Federal's ledger sheet:

1915

Nov. 20	Cash to Sunset Construction Company	\$150.00
Nov. 30	Cash to Sunset Construction Company	200.00
Dec. 22	Cash to Sunset Construction Company	250.00

1916

Jan. 22	Cash to Sunset Construction Company	\$300.00
Apr. 8	Cash to Sunset Construction Company and J. J. Rauer.....	250.00
Apr. 30	.....	20.88
	Total	\$1170.88
	Adding the	17216.49

Total received by Rauer.....\$18387.37

[46]

Receipt of the items omitted by counsel had already been admitted by the statement of account, Exhibit 1; for the first five items named, see page 3 of the credits and \$30.88 is part of the total of \$8409.80 shown on page 5 of the credits.

The trustee's closing supplemental brief, page 22, admits the following are proper credits to Rauer:

Cash	\$2,000.00
Overcharge Joseph Estate (book- keeping entry)	205.52
Teaming	5,190.45
Allowance to Buckman.....	188.60
Allowance to Buckman.....	91.40
<hr/>	
	\$7,675.97

It appears to me plain that counsel for everybody have conceded too much. From the figure of \$17,216.40 conceded by Rauer's counsel to have been received by him, there should be deducted the item of \$227.81, the *pro rata* share of loss on Twenty-first Avenue, which was not a cash receipt but an offset to profits on the other jobs. Deducting this from the figure of \$18,387.37, to which I have increased the amount chargeable against Rauer, gives us a final figure of \$18,159.56, chargeable against Rauer in favor of the trustee. On the other hand, the trustee has included in his allowances of credit to Rauer, two items of \$188.60 and \$91.40, total \$280.00, which appear from the ledger sheet to have been allowances made to Buckman to be credited against the charges of \$2212.78 for checks or otherwise paid to him by the Federal. The net credit to Rauer should therefore be \$7395.97 instead of \$7675.97. Deducting \$7395.97 from the \$18,159.56, we have a balance of \$10,763.59, for which Rauer must be charged in this account. [47]

Deduction of \$3701.60 Paid into Court on Foreclosure of Chattel Mortgage. As stated above, Rauer petitioned the Referee in Bankruptcy in the Matter of the Estate of Buckman, Bankrupt, for an order of sale of the property secured by the chattel mortgage given to Wehrle in his behalf, and that upon the sale, the money paid be impounded to await the disposition thereof by the Court. On December 7, 1907, the mortgaged property was sold to a dummy of Rauer for \$3701.60 (Transcript, 503) and the money was advanced by Rauer and was impounded as prayed. It is Rauer's claim, of course, that the debt for which the chattel mortgage was security had not been paid and that the money should be turned over to him. The trustee, on the other hand charges Rauer with this sum, the amount being stated in error at \$3706.00 (see appendix, page 4, to original final brief).

It is not clear to me why this sum should be charged to him nor why this transaction should enter into this accounting in any manner. If the final result of this accounting should show a balance due to Rauer on some claim filed against the Estate of Buckman and if the Referee should determine that it is preferred, he doubtless will order the impounded money paid to Rauer. If, on the other hand, the result of this accounting should show a balance due to the trustee, then it will likewise follow that Rauer's claim against the estate, preferred or otherwise, will be denied and the money retained as general assets of the Estate in Bankruptcy. In other words, the disposition of the impounded

money seems to me to be a matter for the Bankruptcy Court, guided of course, by the action of this Court upon the Master's report on this accounting.

There are many questions discussed in the briefs which [48] I have not thought it necessary to comment upon and claims on both sides which I have disapproved without comment, in the interest of brevity. It may be, however, that unintentional omissions or mistakes have been made and these should be called to my attention on objections to the report when announced in draft.

SUMMARY.

Admitted amount due Rauer March 13,	
1915	\$28,874.82
Deductions to determine amount due	
February 19, 1915, <i>supra</i> , page 8....	2,187.45
	<hr/>
Statement revised to February 19, 1915..	\$26,687.37
	<hr/>
	<hr/>

Deductions herein made in favor of Trustee as follows:

Admitted credits on mortgage, <i>supra</i> ,	
page 12	\$ 7,500.00
Excessive interest, <i>supra</i> , page 15.....	897.00
Erroneous charge of \$1440.00 and interest, <i>supra</i> , page 16.....	2,001.60
Collections by Rauer a/c 14th Avenue,	
etc., <i>supra</i> , page 20.....	7,323.00
Miscellaneous collections of assets, <i>supra</i> ,	
page 722	1,707.20

Equipment rental Taraval Street, <i>supra</i> , page 24	1,312.50
Equipment rental collected from others, <i>supra</i> , page 24	2,461.13
Federal Construction Company matter...	10,763.59

Total deductions	\$33,966.02
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Statement of Rauer, February 19, 1915..	\$26,687.37
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Balance due Trustee.....	7,278.65
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\$33,966.02

[49]

For the foregoing reasons, I find there is now due from defendant J. J. Rauer to the Trustee in Bankruptcy, the sum of \$7,278.65.

And I conclude that the plaintiff herein should have the decree of this Court that all unpaid checks drawn by the Sunset Construction Company in favor of J. J. Rauer and all promissory notes of said company in favor of said Rauer or any other person as his trustee, if now in evidence in this case, be canceled as paid and that any such checks or notes not in evidence but still held by said Rauer as evidence of claimed indebtedness, be ordered delivered up to be canceled. That the plaintiff, the said trustee, have the decree of this Court directing said J. J. Rauer to pay the said trustee the sum of \$7,278.65, together with interest thereon from the date of the Master's final report herein

until paid at the rate of seven (7%) per cent per annum, and costs of suit.

Dated June 16, 1921.

H. M. WRIGHT,
Sp. Master. [50]

Supplemental Report.

On June 16, 1921, the foregoing report was announced in draft and the parties were given until July 6, 1921, within which to present their objections thereto. This time was subsequently extended to include July 23, 1921, and on the last mentioned date the parties were heard in brief argument as to certain matters contained in the objections. On July 15, 1921, the defendant, Rauer, filed objections, which are herewith separately returned. On July 23, 1921, plaintiff likewise filed objections, herewith separately returned.

The objections disclosed defects in the report that were not unanticipated in view of the difficulty in ascertaining the facts and in disposing of them, to which I have referred in the draft report. Before my consideration was finished, however, Messrs. Grant & Zimdars appeared as additional counsel for defendant Rauer, and left with me a document entitled "Observations Upon Master's Report" to which was annexed a report by Haskins & Sells, Certified Accountants, this document really being additional objections to the report, and asked leave to file it. Counsel for the plaintiff as well as counsel for defendant Rauer were called in to attend

me on August 27, 1921, for hearing as to whether the additional matter should be received. Counsel for the trustee did not object and it was accordingly ordered that the so-called observations be received as additional objections to the report. At the same time the parties were heard in oral argument, the burden of which on the part of defendant Rauer was that throughout the proceedings under the order of reference, the interlocutory decree had been misunderstood and the accounting made and decided under a misapprehension that was vital. Counsel for the Trustee asked leave to brief the matter and, [51] accordingly briefs were filed by the plaintiff on October 14, 1921, by defendant Rauer in reply on October 31, 1921, and by the Trustee on November 10, 1921. These briefs are also separately returned.

I consider first, the point made as to the interpretation of the decree. The defendant contends that the pleadings, the evidence and the decree show that the whole suit concerned the shares of stock of the Sunset Construction Company pledged to Rauer, the pledge being declared void and the property in the stock remaining in Buckman and, by his bankruptcy, passing to the Trustee on February 19, 1915. The accounting ordered between Rauer and others on the one hand, and the company on the other hand, would be useful and was needed to determine whether the shares had value. But, it was urged, since it was Buckman who was declared bankrupt and since the Sunset Construction was never declared bankrupt, the date of bank-

ruptcy had no significance. It must be borne in mind that the theory upon which the accounting had proceeded was that any intermeddling by Rauer with assets of the Company after the date of Buckman's bankruptcy was unauthorized, that he must account for all collections or profits from its assets and be allowed none of its debts to him due to continued business relations after the date of bankruptcy. It is apparent that the point was a serious one, since if his contention was true, it might well be that by including subsequent transactions by way of payments and receipts, it would appear that nothing was due from Rauer, but on the contrary, a sum approximating the sum claimed in his statements of account in evidence was due to Rauer. I think that if the interlocutory decree had been read at the time of the argument, no further discussion would have been necessary. The parties are aware that the terms of the decree embodying [52] the order of reference furnishes the chart of the Master's authority. It is not for the Master to review the proceedings as on a bill of review or as on an appeal. If there is error, it is not for me to correct.

Briefing the interlocutory decree, it provides in Paragraph 1 that A. E. Buckman was on February 19, 1915, the date of bankruptcy, the owner of all the issued stock of the Sunset Construction Company, that on that date it passed to his Trustee in bankruptcy. The second paragraph provides that at all times and on February 19, 1915, he was "The owner of the Sunset Construction Company, a corporation, and of all the property, books and records

of said Company.” That on the day mentioned, “The Company, the property, books and records vested in and became and now are the property” of the Trustee. The third paragraph provides that Rauer and others account for all moneys or property received by them from or advanced by them to the company since December 12, 1911 “For the purpose of determining what claims if any exist between said company and said persons.”

Now it is obvious that the phrasing of the decree was open to criticism in making an individual the owner of a corporation. It is also obvious that there is an inconsistency between Paragraphs 1 and 2 in speaking of Buckman as the owner of the issued stock of a corporation and at the same time of the corporation itself and of its property. Nevertheless, it is necessary for me to obey the decree in its most inclusive form, which is the form embodied in the second paragraph declaring the Trustee the owner of the property of the company.

Counsel for Rauer have made a striking argument by referring to Paragraphs 1 and 3 of the interlocutory decree and utterly neglecting, or at least glossing over, Paragraph 2. They likewise [53] misstated the bill of complaint in saying that it only concerned the ownership of the pledged stock, when it also alleges, rather inartistically to be sure, that the company was merely an embodiment of Buckman and that it was necessary that its assets be realized on for the benefit of Buckman's creditors. It is true that the terms of the third paragraph, directing the accounting of transactions

between *the company and Rauer* can be more readily related to Paragraph 1, declaring the Trustee the owner of the stock in the company, but it is also true that these terms can, without undue violence, be related to Paragraph 2, declaring the Trustee the owner of the company and of its property.

I conclude, therefore, that the reference thus far has been on no mistaken theory, and that Rauer must account to this Trustee for dealings with the company's assets owned on February 19, 1915, after that date, without the benefit of offsets subsequently accruing. There are, of course, difficulties arising out of the fact that the company was never declared a bankrupt, that its creditors have not been scheduled and notified to file their claims and that defendant Rauer will suffer loss by reason of the fact that he believed himself entitled to deal with the company after Buckman's bankruptcy as a separate entity not affected by his bankruptcy. These, however, are matters that concern the correctness of the interlocutory decree only, and so far as Rauer is concerned I shall hereafter embody a recommendation that he be allowed to prove his claim herein.

I consider first the objections of defendant Rauer: The objections originally filed contained 42 pages of typewriting and offended against the rule that objections should be clear and specific in pointing out the matters relied on. The document constitutes [54] an argument and evinces considerable misapprehension of what the report means and

of the evidence that I have before me. Certain misapprehensions of counsel should be corrected. They claim, for example, that I have not followed the directions in the order of reference in that I have not adopted the Rauer accounting in Exhibit 1 and Exhibit 3. I have returned these as part of the evidence, but I have not adopted them for several reasons. One reason was that they amount to a statement of transactions from the beginning of dealings between Rauer and the Sunset Construction Company to the end, long after the bankruptcy of Buckman. The conclusion of Exhibit 3, for instance, that there was a balance due on February 19, 1915, of \$36,807.04 cannot be true since it concerns transactions after that date. This was the balance I sought. Furthermore the account, though professing on its face to be supported by numbered vouchers, was not so supported. The testimony in regard to it was confused, uncertain and lacking as regards many items and there was much omitted that should have been included. I found it impossible either to adopt the report or to state any account in debtor and creditor from the beginning. Accordingly, I accepted as true, a statement of a balance due on March 15, 1915, contained in several documents on file in this court, verified by the oath of Mr. Rauer. It is idle for counsel to say that these documents were hastily prepared. Attorneys should not prepare documents in a legal proceeding hastily, nor should their client verify them unless he is ready to be bound by the statements therein. In taking these figures as I did, shown in these

verified statements as true, and proceeding thereafter to deduct items erroneously included and to charge Mr. Rauer with funds which should be turned over to the Trustee, I conceive that in all respects I am [55] following the order of reference directing me to find the state of the account between the parties. At page 11 and following of defendant's objections and also in the supplemental objections, it is claimed that the item of \$7500.00 credited the company on the Wehrle mortgage debt was or must have been already accounted for in the statement of account as of March 15, 1915, hereinabove referred to. It was argued that this conclusion is supported by the fact referred to in my report, page 7, that there is but slight difference between this statement of account and the amount of outstanding checks shown in the gray book. It is therefore concluded that the March 15th statement included all the outstanding checks and that the balance due on the mortgage must have been carried in open account. The answer to this, however, is that the papers drawn by Mr. Rauer's counsel and verified by him in which the balance is stated also stated the *entire receipts* by Rauer from the Sunset Company since March, 1911, and the *entire payments* since that date. They must, therefore, charge the indebtedness by mortgage and it follows from this that any collection from the security thereafter made is one not represented in the balance stated on March 15, 1915. Another misapprehension is shown in the statement of the original objections, page 40, with respect to certain

checks drawn by the Federal Construction Company, payable to the Sunset Construction Company. Complaint is made that these are charged against Rauer without evidence that he ever received them. The answer has already been given on page 31, lines 1 to 4 of the foregoing report, which show irrefutably that Rauer had already admitted receipt of these items in his statement of account Exhibit 1.

At page 30 and following of defendant's objections will be found a list of payments alleged to have been made by Rauer in the [56] way of repairs to the equipment for which he has been charged with rental and it is stated that the vouchers were in evidence. The numbered vouchers to which counsel refers in his brief are not in evidence. There were a number of bills offered and received without careful examination either by counsel or the Master at the time and these are separately returned. I have examined the transcript of evidence and also these bills. Many of them are duplicates; many concern the year 1918 and only 8 of them are receipted so as to constitute vouchers for payments. Such a loose and careless method of proof must carry its own penalty. I do not know and cannot find that Mr. Rauer paid these bills; they may have been paid by others renting the machinery, or paid in larger amounts, or not at all. The total amount of the bills which bear receipts on their faces is \$286.93. The only possible theory upon which these payments made after bankruptcy could be allowed would be that they

helped to produce rentals during the period when Rauer has been charged with those rentals. The amount of expenditures which were incurred during that period for which rentals have been charged amounts to \$148.43. Trustee's counsel, at one of the later arguments, was willing to concede this amount as a credit, though there is some doubt in my mind as to part of it. Under the circumstances, I will amend the report by allowing Rauer a credit of \$148.43.

At page 19 of the objections counsel alleges errors in the process whereby at page 7 of the report the balance claimed to be due Rauer on March 15, 1915, was figured back to February 19, 1915, the date of bankruptcy. I have gone over the cash book and the black book and have amended my figures by including only plain cash items and amending some doubtful items. The amended objections and especially the accompanying accountants' report pointed out a very patent error at page 8 of the report in that I have deducted the balance of payments to Rauer [57] over receipts from him from the March 15th figure, when it should be added thereto.

The tabulation on pages 7 and 8 should be corrected to read as follows:

1915

Feb. 24	Received J. J. Rauer,	C. B. 356	\$ 245.00
March 1	“ “	loan C. B. 360	30.00
2	“ “	“ “ 360	200.00
5	Paid, J. J. Rauer,	“ 361	\$355.00
5	Received, J. J. Rauer	B. B. 15	125.00
8	“ “	C. B. 360	300.00
12	“ “	loan “ 362	75.00
12	Paid, 2 City warrants,	B. B. 15	495.00
12	Paid, J. J. Rauer,		
	check of Scott,	B. B. 15	535.00
12	Paid, R. Monigan, col-		
	lection cash,	B. B. 15	35.00
15	Received, J. J. Rauer		
	Loan,	C. B. 362	175.00
			<hr/>
			\$1420.00 \$1150.00

The difference between amounts received from Rauer and paid to him is \$270.00. Adding this sum to \$28,874.82, the amount of the account on March 15, 1915, brings the state of the account on February 19, 1915, to the sum of \$29,144.82.

In the deductions that follow on page 8 of the draft report, are included \$897.00, excessive interest (report page 15) and also \$2001.60, due to an admitted error in Rauer's bookkeeping, with interest thereon, making a total of \$2898.60. Deducting these amounts from \$29,144.82 gives us

the figure of \$26,246.22 as the correct amount of the debt due to Rauer on February 19, 1915, instead of the sum given in the foregoing report, for example, in the summary at page 33.

Other deductions shown in the summary and in the report were all in the nature of collections by Rauer of assets of the Sunset Construction Company existing at the date of bankruptcy or were earnings of the property of the company thereafter, to which the [58] trustee, and not Rauer, was entitled. The method employed by counsel for the trustee in their briefs and the method accordingly adopted by the Master in the foregoing report was to credit Rauer with the debt of the Sunset Construction Company and to charge him with these collections made after bankruptcy. This will be clearly seen in the foregoing summary on page 33, resulting in a balance due to the Trustee there shown of \$7278.65.

There are now presented two objections to the draft report by the trustee. The most important of these points out that this procedure of accounting was incorrect in that it resulted in paying off Rauer's debt in full and devoting only the balance to payment of such other creditors as may have proved their claims in the bankruptcy proceedings. The Trustee points out that Rauer should be ordered to turn over all these collections to the Trustee and, of course, it follows that he should also be allowed to prove his debt for his share of any dividends which may be declared. It is surprising that this point has hitherto escaped the

attention not only of counsel, but of the Master. The validity of the objection seems obvious and the point irrefutable. It results that no statement of a balance due can be declared in these proceedings, but there must be found an amount for which Rauer is chargeable, to be ordered turned over to the Trustee; and likewise, there must be found the amount of the debt of the Sunset Construction Company to Rauer at the date of the adjudication in bankruptcy.

In view of this apparent error and of others pointed out in the objections and the amended objections, I have taken the occasion to completely re-examine the whole report as concerns this post-bankruptcy period. I have not restricted myself to the objections pointed out by either party. The error above pointed out is clearly [59] seen in my statement of principles, page 17 of the report. Paragraphs 1 and 3 are correct in charging against Rauer the money collections and rentals, but they are incorrect in applying these amounts in equivalent reductions of the indebtedness at the date of bankruptcy.

Paragraph 2, page 17, is stated, I think, too strongly against the defendant Rauer. In brief, I have stated as a principle to be followed that where the sources of collections were not known, so that I could determine whether they were assets arising prior to bankruptcy or subsequent to bankruptcy, I would consider the prior assets to the extent that Rauer had himself applied them in cancellation of unpaid checks against him before

the bankruptcy date. This I think open to criticism. After all, Rauer's action amounts only to a presumption of an evidentiary character. The burden of proving that the collections made after bankruptcy were of prior assets is on the trustee. It must be remembered that Rauer dealt with the Sunset Construction Company after Buckman's bankruptcy undoubtedly on the theory that he was safe in so doing, since the company had not been declared bankrupt. This being the case, the application of collections to debts of date prior to bankruptcy or to debts of a date subsequent to bankruptcy would not be covered by any principle in Rauer's mind which would aid us in determining whether the assets collected arose prior or subsequent to the bankruptcy date. On reconsideration, therefore, I have eliminated a number of charges against him heretofore made.

On page 18 of the report the item of \$990.00, proceeds of city warrants, should be omitted. This was collected on February 10, 1915, before the date of bankruptcy. [60]

On page 19 of the report, the Webb collection on May 20, 1915, of \$137.50, is omitted. As to all these Fourteenth Avenue bills there was a question whether it was for grading done before bankruptcy or paving done after bankruptcy. There was a grading charge against Webb, voucher 2234, for this amount and also a payment on May 20th (C. B. 2) by check turned over to Rauer. It is claimed, however, in the amended objections that this amount was in payment by way of compro-

mise of a larger bill for paving (objections 14-a) and that the prior bill had been paid on February 3, 1915. At page 338 of the cash book under this date appears the entry of a receipt on account of Fourteenth Avenue from "J Weissben, Webb. sign. \$125.00," which check was not turned over to Rauer. See also page 33 of the gray book. In view of the fact that voucher 2233 for grading, \$137.50, against Thomas A. Vogel, seems also to have been paid, C. B. 322, on January 26th, by Weissben, in the same sum of \$125.00, there is some indication that counsel's contention is correct and accordingly I eliminate this charge.

As regards charges, report page 19, for collections from Hyman, I have concluded to eliminate the charge against Rauer for \$500.00 collected on June 4, 1915. The receipt in evidence bears what purports to be Rauer's signature but he denied its identity and it may well be that his name was signed by Buckman. There is enough doubt to warrant a reconsideration in this respect. Counsel's statement in the amended objections, page 13, that my finding that the grading charge against Hyman was \$1,419.00 is arbitrary and not sustained by any evidence whatsoever, is a reckless assertion in view of the fact that voucher 2239 therefor reads in terms, "For grading Fourteenth Avenue," etc. [61]

On page 19 of the report I have eliminated the item of \$2,830.50 charged against Rauer and charge him only with the Dufau check, \$20.00, the check of Rider \$245.00 and with \$649.00 from H. Meyer,

the amount of his grading bill, voucher 2232, being part of a larger payment made by him on May 25, 1915 (C. B. 2 page 2) in the sum of \$3,148.04, and the check turned over to Rauer. As regards these matters Rider, in fact, paid Rauer \$306.70 of which \$245.00 was the proceeds of a note given by him to the company and turned over to Rauer on February 24, 1915, which seems clearly for work done prior to bankruptcy. As for the check of \$3,148.04 of H. Meyer I am, on reconsideration, unable to determine that any of this was for work done prior to bankruptcy except the sum of \$649.00 mentioned. So also as to the items on page 20 of the report where I have charged Rauer for portions of checks of Getz, Gardizer and Jordan, the amount of the charge being a total of \$1,200.00. My reconsideration leads me to conclude that it is not sufficiently proved that those assets arose prior to bankruptcy. As regards the collections made on Fourteenth Avenue grading contracts, defendant's counsel in the amended objections frequently assert that they were made to Rauer by virtue of assignments executed more than four months prior to the bankruptcy. I have no knowledge that this is so. It was the office of the objections to point out this evidence clearly stated in the proofs before me. No written assignments are in evidence and the Master is not obliged to wander at large through an extensive record in search of the evidence asserted to exist.

I come now to the sum of \$10,763.59 charged against Rauer in the draft report, page 25 and following, on account of his collections from the Fed-

eral Construction Company. The draft report recognizes [62] that while part of this collection was for rental of equipment, part was for services of Buckman and no segregation was made in the report for lack of proof of the value of Buckman's services. The claim was assigned by the Sunset Construction Company to Rauer in June, 1916, and so far as any value could be predicated on Buckman's services, Rauer was entitled to that value, not the trustee, since the service was all done subsequent to Buckman's bankruptcy. I am not satisfied with my disposition of the matter, which is, of course, based solely on the fact that the evidence does not afford me an adequate guide to apportion part of this money to the account of Buckman's services and part to the account of rental of equipment. I have concluded, therefore, to adopt a *judicium rusticum* and cut the charge in half on the assumption that Buckman's services were worth an equal amount with the rental of the equipment.

As regards the item of miscellaneous collections, page 21 of the report, I have yielded to objections on behalf of Rauer to the extent of deducting \$100.00 therefrom on the claim that of the \$500.00 order upon Bosworth turned over to Rauer, he collected only \$400.00. The other charges seem to me proper. With respect to the Reeder & Foster item, the amended objections, page 21, states that the black book, page 31, by which must be meant the cash book page 31, "Shows this \$407.20 to have been paid by the Sunset Construction Company to Cramer. Rauer received not one cent of it and

surely should not be charged with it. That transaction was in July, 1915, and Mr. Rauer had nothing whatever to do with it." This is a very mistaken and reckless statement of the facts. Cash book #2, page 30 shows that on July 6th, the Sunset Construction Company received from Foster & Vogt (which seems to have been another name for Reeder & [63] Foster) in full for June team hire, the sum of \$907.20. Page 31 shows that on July 3 there was given to D. F. Cramer an order on Foster & Vogt for \$500.00 and on July 6th, to J. J. Rauer a like order for \$407.20. This was the bookkeeper's crude method of indicating that Foster & Vogt had paid their bill by signing two orders in the total sum of the amount of the bill. Rauer's statement of account acknowledged the payment. It is idle for counsel to say that Rauer had nothing to do with this transaction.

The foregoing represents all the modifications that have been made in the draft report. The following is a tabulation of the amounts which have been charged against Rauer as assets of the Sunset Construction Company at the time of bankruptcy, collected by Rauer subsequent thereto, together with their dates, where suggested, and a reference to the pages of the draft report:

Page 19:

1915.

March	11	1	city warrant	.....	\$	495.00
May	31		Check of Hyman	.....		750.00
"	24	"	" " "	.....		250.00
"	25	"	" " Dufau	.....		20.00
"	25	"	" " Ryder	.....		245.00
"	25	"	" " H. Meyer	.....		649.00
Page 22:			Miscellaneous collections	..		1,607.20
Page 24:						

1916.

Jan.—Rental of equipment on

"T" Street job	.....	\$1,312.50	
Less repairs	.....	148.43	1,164.07

Miscellaneous collections of rent-	
als	..... 2,461.13

Page 31:

1/2 Federal Construction Company	
payment	..... 5,381.79

Total \$13,023.19

[64]

The Trustee also objects that Rauer should be charged interest on these sums from the time they were received by him. The allowance of interest is in the discretion of a court of equity and it seems to me that where the liability is disputed and dependent, as here, on the issue of litigation to determine the fact of liability, the delay in payment should be considered the act of the law and interest should be allowed only from the date of the

assessment of the amount due in the Master's report. We are now in a position to summarize.

It has been determined that the amount owed to Rauer on February 19, 1915, was \$26,246.22 *ante* page 42). If nothing had been paid on this account he would be entitled to prove a claim for this amount. It has appeared in evidence, however, that in December, 1915, he credited \$6000.00 in the extinguishing of the mortgage to Viola Clark as Rauer's trustee, and on July, 1915, received from the Taylor Estate \$1500.00 in satisfaction of a claim assigned to him by the Sunset Construction Company more than four month prior to the bankruptcy. He was clearly entitled to retain these moneys, but the amount due as of February 19, 1915, \$26,246.22, has evidently been extinguished to that extent, leaving his provable claim in the sum of \$18,746.22. Thus there is due to Rauer the last mentioned sum to be paid in due course of administration, and there is due from Rauer to the bankrupt estate the sum of \$13,023.19, to be paid forthwith in full, to the Trustee. There is deposited in court, however, the sum of \$3701.60, the proceeds of sale of the chattel mortgage security and note held by Rauer. This note would constitute a preferred claim and the money impounded is payable to him. It seems to me that under these circumstances, account can [65] be taken of this fact in this report. If, therefore, we deduct from the two sums given above the sum of \$3701.60, Rauer's claim will be reduced by the amount of the security thus applied and at the same time the

funds now in court will be released for the general purposes of the estate, rather than paid to Rauer, and at the same time save him from paying in that much additional money. Deducting \$3701.60 from the \$18,746.22, we have \$15,044.62 due to Rauer from the estate in bankruptcy, and deducting a like amount from \$13,023.19, there is due from Rauer to the Trustee the sum of \$9321.59.

I accordingly conclude and report:

1. That \$3701.60 now deposited with this Court in the Matter of the Bankruptcy of Buckman should be declared due to J. J. Rauer, but that the same should be retained and payment made by credit on the amount hereinafter declared to be due to the Trustee from said J. J. Rauer.

2. That there is now due and payable from J. J. Rauer to the plaintiff Trustee, after crediting said sum of \$3701.60 now in Court, the sum of \$9321.59, with interest from date of this report at the rate of seven (7%) per cent per annum.

3. That there is due from the Trustee, plaintiff herein, to said J. J. Rauer, the sum of \$15,044.62 after crediting on said debt the above sum of \$3701.60; that said claim should be allowed in the estate in bankruptcy of said A. E. Buckman as an approved claim in favor of said J. J. Rauer, to be paid in due course of administration.

4. That plaintiff should have his costs. [66]

Each party will be deemed to have objected to the changes made in this supplemental report.

The foregoing draft report as modified by this supplemental report is hereby settled, signed and

filed as my final report herein, and the parties notified by me this 12th day of December, 1921.

H. M. WRIGHT,
Special Master. [67]

LIST OF EXHIBITS.

Exhibit No. 1, Statement of account of J. J. Rauer.

Exhibit No. 2, Statement in explanation of account.

Exhibit No. 3, Amended and supplemental account.

Exhibit—Black book of Sunset Construction Co.

“ Gray book of Sunset Construction Co.

“ Cash book of Sunset Construction Co.

“ Cash book of Sunset Construction Co.

“ Voucher book of Sunset Construction Co.

“ 4 check books of Sunset Construction Co.

“ Bundle of checks of Sunset Construction
Co. and of J. J. Rauer.

“ Certified copy decree Wehrle vs. McCoy.

“ Letter of Pacific Gas & Electric Co.

“ Bill #2371 to O. Heyman Bros. and
copies Heyman's ledger sheets.

“ Copy note, etc., dated Nov. 11, 1911.

“ Stipulation and various exhibits.

“ Copy Federal Construction Co. ledger
sheet.

“ Copy Federal Construction Co. journal
sheets.

“ Assignment Rauer vs. Buckman.

“ Receipt Rauer to Heyman June 8, 1915.

“ Sand machine statement and copies of
B. P. W. certificates.

“ Rauer's ledger sheets.

- “ Statement beginning May 20–21, 1915.
 “ Pay-rolls and various bills.
 “ Miscellaneous papers and checks.

[Endorsed]: Filed Dec. 12, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
 [68]

Record of Haskins & Sells, Public Accountants.

New York	HASKINS & SELLS	Kansas City
Chicago		Seattle
Philadelphia		Portland
Detroit	Certified Public Accountants	Denver
Cleveland		Atlanta
Saint Louis	Cable Address “Haskells”	Dallas
Boston		Salt Lake City
Baltimore	Crocker Building	Tulsa
Pittsburgh		Watertown
San Francisco		
Los Angeles	San Francisco	London
Buffalo		Paris
Cincinnati		Havana
New Orleans		Shanghai

August 17, 1921.

In the Southern Division of the District Court of
 the United States in and for the Northern
 District of California, Second Division.

No. 233—IN EQUITY.

GEORGE J. HATFIELD, Substituted for R.
 CORDS, Jr. as Trustee of the Estate of
 A. E. BUCKMAN, Bankrupt,
 Plaintiff,

vs.

A. E. BUCKMAN, J. J. RAUER, WM. H.
 CHAPMAN, FILMORE BUCKMAN,
 SUNSET CONSTRUCTION COMPANY,
 a Corporation, et al.,
 Defendants.

Mr. J. J. Rauer has submitted to us for examination the copy of the Master's report on accounting in the above-entitled matter, and also Mr. Rauer's own explanation of his account and a copy of said account, and his criticism of the conclusions reached in the Master's report on accounting. We have carefully gone over these documents, and submit the following brief conclusions without having made an examination of the records or books of account of either Mr. J. J. Rauer or the Sunset Construction Company.

As to ascertaining the balance owing by the Sunset Construction Company to Mr. Rauer on February 19, 1915, by taking as a basis the amount of a balance stated by Mr. Rauer as being the balance due him March 15, 1915, it is our conclusion that the deductions [69] and additions made to this balance according to the Master's report should be reversed. Assuming the total paid to and received from Mr. Rauer in the period from February 19, 1915 to March 15, 1915, as stated in the report, and the balance as of March 15, 1915, as stated, we would arrive at the balance as of February 19, 1915, as follows:

Balance due J. J. Rauer March 15, 1915,	\$28,874.82
Add payments to Mr. Rauer from February 19, 1915, to March 15, 1915,	3,212.45
Total	<hr/> \$32,087.27

Deduct receipts from Mr. Rauer from	
February 19, 1915, to March 15, 1915,	1,025.00
	<hr/>
Balance due J. J. Rauer, February 19,	
1915,	\$31,062.27
	<hr/>

By taking the balance owing to Mr. Rauer thus arrived at as the balance on February 19, 1915, and credited Mr. Rauer with all money received from him between February 19 and March 15, namely, \$1,025.00, and charging him with all moneys paid to him between February 19 and March 15, namely, \$3,212.45, it will be seen that the balance of \$28,874.82 would be the balance due Mr. Rauer on March 15, 1915.

We have examined a statement submitted by Mr. Rauer which, we understand, shows the transactions with the Sunset Construction Company as recorded upon his books. This statement shows a balance on the account to February 19, 1915, of \$38,407.95, due Mr. Rauer.

As to the items of \$1500.00 referred to on line 19, page 10, of the Master's report, and \$6,000.00 referred to on line 23, page 10, of the same report, these amounts appear to have been credited the Sunset Construction Company account, according to the statement submitted to us, and it would therefore appear that the deduction of \$7,500.00 made by the Master, as shown on lines 1 to 8, page 12, of the report referred to, is a duplication of these credits. [70] Although the dates and amounts of these credits as shown by the statement are July

20, 1915, \$1,500.00, and December 7, 1915, \$6,000.00, the credits are applied against the balance of the 1911 account, which balance was not carried forward. If this balance had been carried forward into the subsequent accounts, these credits should have been allowed therein, but it not having been done, the credits would not appear as again applicable to accounts after 1911, the balance in favor of Mr. Rauer on this date being wiped out by these credits.

In as much as we have made no examination of the books, we cannot give an opinion as to the correctness of any of the balances or items referred to, but from the data submitted the discrepancies as noted above appear clear to us.

As to the question of grading bills and paving bills collected by Mr. Rauer, we have not had the opportunity to examine the books and can express no opinion as to the propriety of these charges.

The question as to whether or not Mr. Rauer is entitled to rentals on his patent rights, or is to be charged rentals for the equipment, and whether or not he is entitled to deduct betterments, repairs, and expenses, is not so much an accounting question as one of law. By examination of the books and records, the correct amounts could probably be ascertained or verified.

The Master's report in connection with the Federal Construction Company job, lines 23 to 25, page 30, shows several items charged Mr. Rauer which are indicated as being received by the Sunset Construction Company from the Federal Construction

Company, as shown by the transcript of the Federal Construction Company's ledger, as indicated. These items are:

Nov. 20, 1915, cash to Sunset Construction Company	\$150.00
Nov. 30, 1915, cash to Sunset Construction Company	200.00
Dec. 22, 1915, cash to Sunset Construction Company	250.00
Jan. 22, 1916, cash to Sunset Construction Company	300.00

[71]

Also, on page 31, line 26, an amount of \$2,212.78 for checks paid to Buckman is by the Master's report charged to Mr. Rauer.

Respectfully submitted,

HASKINS & SELLS. [72]

In the Southern Division of the District Court of the United States in and for the Northern District of California, Second Division.

No. 233—IN EQUITY.

GEORGE J. HATFIELD, Substituted for R. CORDS, Jr., as Trustee of the Estate of A. E. BUCKMAN, Bankrupt,

Plaintiff,

vs.

A. E. BUCKMAN, J. J. RAUER, WM. H. CHAPMAN, FILLMORE BUCKMAN, SUNSET CONSTRUCTION COMPANY, a Corporation, et al.,

Defendants.

Observations upon Master's Report. [73]**EXPLANATION OF THE ACCOUNT OF J. J. RAUER, AND THE ITEMS ENTERING INTO THE BALANCES SHOWN THEREIN.**

Page 1. This shows the account balanced as of Dec. 9, 1911, at \$19,629.16.

To arrive at this balance, credits are given to Sunset Construction Co. of the following items:

Jan. 25, 1912, Mortgage.....\$6,734.16

July 20, 1915, Taylor Estate..... 1,500.00

Dec. 7, 1915, a/c Mortgage..... 6,000.00

It will be noticed that the last two items (aggregating \$7500) were not entered until afterwards. The explanation of this is that the account was originally balanced by the note for \$15,000 to secure the payment of which the property was transferred to Clark. This property was carried as security for some time for the balance on this note which had been reduced by the payment of \$6,734.16, on January 25, 1912, to about \$8000.00. Finally, on December 7, 1916, the matter of its continuing as security was determined by crediting against the balance owing on the \$15,000 note, the \$6,000 and the \$1500.00, and wiping out that obligation entirely.

That this account was so balanced by the \$15,000 note, upon which the balance of about \$8000 was secured by the real estate mortgage and that the \$8000 balance did not enter into the subsequent accounts or balances, and was kept entirely separate, and was subsequently paid and balanced by giving

credits for the balance of the mortgage of \$1500 and \$6000 is conclusively shown by accounts and statements and balances that follow;

It will be seen that the balance on Dec. 9, 1911, is not carried over to the next account as \$8000 or \$7500, the balance then unpaid on the \$15,000 note, but no debit balance at all is carried over; the balance carried over being a credit balance instead of \$46.66, that Rauer owed the company. And therefore when this debt is afterwards fully satisfied by the credits of \$1500.00 and \$6000.00 for the mortgaged property, these credits can apply to this account alone and not to any subsequent accounts or balances.

The next account, Jan. 9, 1912, starts with a balance [74] against Rauer of \$46.66. If the balance on the note had been taken into consideration and carried forward, this balance would have been over \$7000 in Rauer's favor.

The account beginning Jan. 9, 1912, and ending February, 1912, which account is balanced by the Sunset Construction Co. owing to J. J. Rauer \$765.84, does not take the balance on the \$15,000 note into consideration either.

Page. 2. The balance carried over from page 1, is here shown as \$765.84, and as we have stated, if the \$8000.00 balance on the \$15,000.00 note had been taken into consideration the balance in Mr. Rauer's favor to start out on this account would have been \$8,765.84; and this account on page 2 is balanced by showing an indebtedness to Mr. Rauer thereon, as of November 24, 1912, of \$8,125.00.

As will be seen from this account, the \$8000.00 balance on the \$15,000.00 note has not been taken into consideration therein whatsoever; that this \$8000.00 balance is in existence is shown, however, in this account by the mention thereof on May 25th, showing the giving of a check for \$661.74, "Make balance 15 to 8." This check, however, was not paid, and it is charged back as one of the unpaid checks on the other side of the balance. This balance of \$8,000.00 is not there taken into account whatsoever. Had this balance of \$8,000.00 on the \$15,000.00 note been taken into account, the balance on November 24th, owing to Mr. Rauer would have been, instead of \$8,125.00, \$16,125.00. [75]

Page 3. Page 3 shows, at the beginning, a statement of the balance on the \$15,000 note as \$8,000, but this balance, as the account shows, is not taken into consideration in the account itself, which on February 8th is balanced to show an indebtedness of \$12,500 owing to J. J. Rauer. If this balance on page 3 stated as of Feb. 14, 1913, had taken into consideration the \$8000.00 balance on the \$15,000 note, it would be \$20,500, instead of \$12,500.

Page 4. Here the balance of \$12,500 is carried forward and again stated as of Jan. 1, 1914, as being \$12,500. And the same is true that if the \$8,000 had been taken into consideration, this balance would have been \$20,500.

This balance of \$20,500 agrees materially with the statement that appears in the Sunset books as of Dec. 12, 1913, pages 4 and 5, as follows:

“Balance due J. J. Rauer to this date, \$20,000. All other money due J. J. Rauer covered by ck. and orders.”

The last account on page 4, shows a balance as of Feb. 16, 1915 (just previous to the insolvency) in favor of J. J. Rauer of \$33,084.95. This balance, as the account plainly shows, and is verified by the quotation from the Sunset books above given, did not take into account the \$8,000 balance owing on the \$15,000 note, and if this had been taken into consideration the balance instead of being \$33,084.95 on that date, would have been \$41,084.95.

Page 5. Here it is shown that the balance of \$33,084.95 stated on page 4 should be still further increased by certain unpaid checks issued to Rauer between May 22, 1913, and Feb. 8, 1915, which had been omitted from the previous statements, and which total \$4,652.70. This added to the \$33,084.95, makes the balance owing Rauer on Feb. 19, 1915, \$37,737.65, and nowhere in those [76] balances has the \$8,000 owing on the \$15,000 note been added in; if this were added in, the actual balance then owing to Rauer would have been \$45,737.65. And only if the balance had been so figured (including this \$8,000) would it have been proper to deduct the allowance made for the mortgage equity therefrom.

It will also be noticed that at the date of the ending of the first account (December 9, 1911) (page 1), the first Sunset Construction Company came to an end, and in order to balance its account gave the note for \$15,000, made the mortgage on the Clark lots

for \$9,000.00, paid a part of this \$9,000 on the \$15,000 note and reduced it to about \$8,000, and provided that the conveyance of those lots to Clark shall stand as security for the payment of the \$8,000 balance on the \$15,000 note. This is the reason why the \$8,000 balance never subsequently figured in Mr. Rauer's accounts, and therefore when this \$8,000 balance of the \$15,000 note is wiped out by the credit for the equity of the mortgage, this credit of \$1500 and \$6,000 should not be deducted from the subsequent accounts. That this is so, is fully admitted in plaintiff's opening brief, pages 1 and 2, and there can be no escape from the correctness of this conclusion.

The Master, however, has entirely disregarded the statements made and the balance as shown by Mr. Rauer's accounts as submitted, and has taken instead a figure hastily cast by Mr. Rauer as the balance as of March 15, 1915, of what? Of the moneys secured by the chattel mortgage; and which Mr. Rauer so hastily made from his books late in 1916, and for a purpose not of stating the actual or full account, but for the purpose of laying the foundation for his rights to ask for the foreclosure of a chattel mortgage.

And right here it must be remembered that when Mr. Rauer so hastily cast his balance from his accounts he did so from the accounts above referred to, which did not take into consideration the \$8,000 balance on the \$15,000 note given at the closing of the accounts of the first Sunset corporation; and consequently there is no rhyme or reason that from

this \$28,874.82 so hastily stated [77] as the balance, there should be deducted the credit given for the equity of the mortgage given to secure this \$8,000.00 balance, which never entered into these accounts.

When this petition stating the balance at \$28,874.82 was sworn to (Nov. 13, 1916), the \$8,000 balance on the \$15,000 note had been settled by allowing the \$7,500 in full for the equity of the mortgage securing it, and had been so credited in the separate account balancing the \$15,000 note and the account of the first corporation.

It must also be borne in mind that in this very petition (which the Master attempts to make the starting point for this accounting) this \$28,874.82 is described as "all secured by chattel mortgage" thus showing in itself that it excludes the \$8,000 balance of the old account, which was secured by the real estate mortgage given to Clark. Therefore again we see that the credit given for this equity of the real estate mortgage in settlement of the \$8,000 cannot be deducted from the \$28,874.82.

If the Master takes this statement for one purpose, viz., that of stating the balance, he must give due effect to all the statements therein contained explaining what this balance is.

This real estate mortgage account of the first Sunset Company was finally wound up late in 1915, and the credit of \$1500 and \$6,000 properly given only in this account; and the petition stating this balance of \$28,874.82 was not filed for a year afterwards, and for every logical reason this balance did

not take into account this credit on the real estate mortgage.

Of course, the second Sunset Company had been given by Mr. Rauer the right to redeem from this real estate mortgage upon the condition that they would, during the time it had this right, pay the interest upon the \$8,000 balance, and it did pay the interest until the final agreement was made in December, 1915, that Mr. Rauer should take the property for his balance of \$8,000.00; and the only thing concerning the \$8,000 balance that ever figured in the [78] subsequent accounts was the interest paid thereon, and one check for \$661.74, which was given on May 25, 1912, to make the balance an equal \$8,000.00, and the accounts will show that this check was never paid, and was simply charged back.

Again, in the amended and supplemental account of Mr. Rauer, the latest item is dated in December, 1916, and the account was actually not filed until long after that (Oct. 29, 1917); and it was only when Mr. Rauer was casting this account that he discovered he had omitted from the previous statements the unpaid checks dated previous to February 19, 1915, which appear on page 5 of this account, and which total \$4,652.70.

It must therefore be clear that when Mr. Rauer hastily stated a balance for the purpose of the petition for foreclosure of the chattel mortgage (Nov. 13, 1916) that these checks, totaling \$4,652.70 were

not included in the balance there so hastily stated
 at\$28,874.82
 and that to get the true balance the total
 of these checks should be added thereto,
 viz. 4,652.70

making even the balance so hastily cast a
 total of\$33,527.52
 and this exclusive of the \$8,000 balance secured by
 the real estate mortgage.

As stated before, Mr. Rauer claims a balance owing him from the Sunset Construction Co. on February 19, 1915 (and which does not take into account the \$8,000 balance secured by the real estate mortgage) to have been \$37,734.65, and his accounts clearly show that this is the case. The Master has seen fit to start with a balance hastily cast for an entirely different purpose, and where the exact amount owing was not the question, but the only question was, was there a sufficient amount owing to warrant Mr. Rauer's request; and this was so hastily cast at \$28,874.82 as the balance as of March 15, 1915. [79]

This can in no way be taken as an admission by Mr. Rauer, and we think the purpose of this accounting is not to grab at some outstanding figure, the coming into being of which was for a purpose entirely different than an accounting, but that the purpose of this proceeding is to go into the actual accounting, and see whether this, or any other balance given, is correct.

Mr. Rauer cannot understand either why the balance between him and the Sunset Construction Co. should be restricted to the date of February 19, 1915, when his dealings with this company extended until its end in 1917, and when the Sunset Construction Company was never adjudged a bankrupt, and was at all times a separate entity from A. E. Buckman, and the creditors of the Sunset Construction Company had never in the Buckman proceedings, or any other proceedings, been notified to file their claims, or any action whatever in the shape of a bankruptcy proceeding taken against the Sunset Company, and Mr. Rauer and other creditors, were dealing with the Sunset Co. in utter ignorance that it could be affected in the slightest way by the Buckman proceedings, and even the trustee of Buckman, when he instituted these proceedings, only asked that he be adjudged, as the successor of Buckman, to be the owner of the stock of the Sunset Construction Co. Certainly this does not give the trustee any right to cut Mr. Rauer off at any particular arbitrary date with the Sunset Construction Co. and does not give the trustee the right to invalidate any of the acts of the Sunset Construction Company, which was a duly organized and functioning corporation.

It must also be remembered that every one of the contracts in which Mr. Rauer has been concerned was a contract made by the Sunset Construction Company, and not by Mr. Buckman, and the insolvency of a stockholder, whether he is the owner of one or practically all the stock of the corporation, cannot

directly affect the status of the corporation; and these contracts of the Sunset Construction Company cannot thereby become *ipso facto* the sole property of the stockholder. [80]

It is true the order making this reference to the Master for the accounting, does use some loose terms that standing by themselves, might be construed as holding that the property and contracts of the Sunset Construction Company became *ipso facto* the property of the trustee, but this cannot be its effect, for the foundation of this order, the petition or complaint of the trustee, does not ask any relief except to have it declared that the stock of the corporation is the property of the trustee as the successor of Buckman. Neither could this conclusion have been arrived at from the facts set up in the petition or bill; and besides to give it that interpretation would be nullifying the Insolvency Act, and this the Court could not do.

The only right which the creditors of Buckman individually can possibly have to the property or assets of the Sunset Construction Co. if Buckman had owned all the stock, would be the property that would remain after the Sunset Construction Company creditors had been fully satisfied; and not only its creditors up to February 19, 1915, but its creditors clear to the end of operations; and Mr. Rauer should be permitted not only to have all the property of the Sunset Construction Company applied to his debts and the debts of its other creditors up to February 19, 1915, but also to the end of their dealings.

In view of the foregoing position, of course, the Master's finding and report and the discussion thereon which follows, would be academic.

But even assuming that our position as just stated is not the correct one, and that the position that the Master has taken, viz.: that the contracts, instead of being the contracts of the Sunset Co., are the contracts of Buckman, and that they must all end so far as this matter is concerned as of February 19, 1915, there are certain matters in the Master's report even inconsistent with this position, which we shall now take the liberty to point out.

For instance: [81]

Referring to pages 7 and 8 of the Master's report:

The deductions there made from the \$28,874.82, taken by him as the balance on March 15, 1915, are presumably made for the purpose of arriving at the balance that was on February 19, 1915:

The item on line 21, of money "Paid,
J. J. Rauer to D. F. Cramer for stock hire
in advance\$200.00

And the similar item on line 28 of..... 704.96 cannot be deducted for this purpose, unless at the same time the credits therefor are given to Rauer on the other side of the account. These items appear to be money paid to Rauer for the purpose of paying it to Cramer for the purpose of paying for stock hire in advance. On the other side of the account Rauer is given no credit for these payments of these very sums to Cramer. Rauer did not get this money for himself, but he was simply the agent

to pay it out to somebody else. Assuming for the sake of argument that the balance owing to Rauer on February 19th was \$30,000, and on March 1st, Rauer was given \$30,000 by the Company to pay a debt of the Company to Cramer, and Rauer paid this \$30,000 to Cramer on March 10th. And on March 15th, Rauer makes a statement, which shows the \$30,000 indebtedness previous to Feb. 19th, and also shows that the Company had given him \$30,000 on March 1st to pay to Cramer for team hire in advance, which he had done on March 10th; then, according to the Master's arithmetic, the Company would have owed Rauer nothing on February 19th.

As a matter of fact, the check (No. 8536) for \$704.96 was never even paid by the Sunset Construction Company, and has been charged back by Mr. Rauer in his subsequent accounts on June 3, 1915. The fact is that both these sums should be credited on the other side of the account as money paid out by Mr. Rauer for the benefit of the Sunset Company. These two items alone would reduce the Master's deductions by\$904.96
[82]

The item: "March 5th, 'Paid J. J. Rauer \$355.00' shows on the black book, pages 14 and 15, to have been the repayment of two loans, evidently not even evidenced by checks, and was undoubtedly money given by Rauer to the Sunset Construction Co. out of hand to be repaid in a day or two, and was so repaid by two payments of \$230.00 and \$125.00. Rauer should be given credit for the money which

this repays, on the other side of the account, viz.:
 the sum of\$355.00

As to the item: "March 12th, Paid J. J. Rauer
 Checks taken up and interest..... 865.00

This should not enter into the deduction either, unless the checks taken up thereby and interest are also entered on the other side of the account, for these checks so taken up were unpaid on February 19th, and instead of the balance on February 19th, being less by that amount then, it would be greater by that amount then the balance on March 15th.

But assuming the items, as stated by the Master on pages 7 and 8, state correctly all the credits and charges between Feb. 19, 1915, and March 15, 1915, which should be taken into consideration in figuring back from the balance stated on March 15th, to get the balance owing to Mr. Rauer on Feb. 19, 1915, then, we submit, the method of computation should be just the reverse of that employed by the Master, and to the balance stated as of March 15, 1915, as\$28,874.82

There should be added the amounts paid

to Mr. Rauer between February 19th

and March 15th, viz.: 3,212.45

\$32,087.27

And there should be subtracted the
 amounts paid by Mr. Rauer between

Feb. 19th and March 15th, viz.: 1,025.00

Giving the balance owing Mr. Rauer on

Feb. 19, 1915, as.....\$31,062.27

To prove this:

Start with the balance owing Mr. Rauer

Feb. 19, 1915, as.....\$31,062.27

Credit Mr. Rauer with all he loaned be-

tween Feb. 19, and March 15th..... 1,025.00

\$32,087.27

Debit him with all that was paid to him

between Feb. 19th and March 15th.... 3,212.45

Gives the balance owing him March 15,

1915, as\$28,874.82

Taking the balance so ascertained to be

owing to Mr. Rauer on Feb. 19, 1915..\$31,062.27

And adding thereto the sum of the checks

and payments omitted from Mr.

Rauer's previous accounts, and which

were made prior to Feb. 19, 1915, but

as to which Mr. Rauer did not discover

until long afterwards that they had not

been entered in his books (see page 6 of

his account) 4,652.70

Gives the balance owing Mr. Rauer Feb.

19, 1915, as\$35,714.97

(Taking, of course, as a basis the balance so stated by Mr. Rauer for an entirely different purpose as of March 15, 1915.) [83]

Page 12, lines 1 to 8 of the Master's report, deals with the \$7500 deduction, which we have fully

covered in the opening paragraphs of this statement, and in the explanation of Mr. Rauer's account; where we have shown that these credits for the equity of the real estate mortgage do not belong to this account at all, but are a cancellation of the \$8000 balance on the \$15,000 note, owing by the first corporation in the final closing of that first corporation's account.

We again call attention to the fact that in the plaintiff's opening brief, pages 1 and 2, he fully adopts the explanation we have given. He also does this throughout his other briefs.

Pages 17 to 20 of the Master's report concerns itself with the question of \$8,040.60, on account of the Fourteenth Avenue contracts. It is stated in the Master's report that part of this collection was on account of a grading job finished by the Sunset Construction Co. before February 19th, and part for a paving job entered into and finally finished long after February 19, 1915; that admittedly the money collected on the paving job should not be charged against Mr. Rauer, because Rauer did this himself, but that the money collected on the grading job belonged to the Sunset Construction Co. and became an asset of Buckman, and should be accounted for by Mr. Rauer. Mr. Rauer takes the position that the grading job was his by virtue of assignment from the Sunset Construction Company, and that he has the right to credit the collections he has made on either or both against any claims he has against the Sunset Construction Co. clear to the end of his dealings.

This grading job was completely finished before February 19th; it was entered into by the Sunset Construction Co., and the contract assigned to Rauer, many months previous to four months before the Buckman insolvency; that the collections were made by Rauer in pursuance to that assignment—and they are all his property to be [84] applied on his account as he sees fit.

And even if the Master's position be correct that the Buckman insolvency *ipso facto* threw the corporation also into insolvency, then Rauer would have his claim against the insolvent estate for everything that was owing him on Feb. 19th, and if he subsequently credited moneys that belonged to him against his balance, he would be permitted to correct this mistake.

But if for the sake of argument the position taken by the Master be taken as correct, then for the purpose of ascertaining the collections made by Rauer on the grading job, we suggest that the books of the companies concerned, and the grade sheets issued, and the estimates therein shown, and which are in evidence here, clearly indicate the amount estimated as the cost of the grading, and the amount estimated as the cost of the paving, and we see no reason why the arbitrary position should be taken of charging Mr. Rauer with every collection for which he delivered up a check dated prior to February 19th, when it positively appears that Mr. Rauer did not know and had no conception of the contention that is now being made that the Sunset Construction Co. was affected by the insolvency of

Buckman, and that he could not deal with the Sunset Construction Co. as a separate entity.

But taking up these items separately:

Lines 25 to 29, page 18, concern the item of \$990.00 collected by Mr. Rauer on February 10, 1915, from the city. It does not appear from the Master's report that this was for grading, but it is stated that at the same time two checks for the same amount which had been previously given to Mr. Rauer were surrendered to the Sunset Construction Co. by him and cancelled. The complaint is that the \$990 does not appear in the balance of February 19, 1915, nine days afterwards. May we ask why it should? If this \$990.00 appeared then the checks taken up thereby should also appear on the other side of the account and they would balance each other. Certainly the checks [85] paid on February 10, 1915, would not appear in the balance of February 19, 1915. This \$990 should not be charged to Mr. Rauer.

Items lines 12 to 19, page 19: Of this \$1,500 which is here charged against Mr. Rauer, H. Graham received \$500.00 on an order from the Sunset Construction Co., as part of a total order and sum paid him of \$1,179.03. (See Hyman Bros. account in the Sunset Construction books.) Surely the money paid to and received by H. Graham on an order from the Sunset Construction Co. cannot be charged against Mr. Rauer, who had absolutely nothing to do with it whatsoever.

Again:

According to this Hyman account in the Sunset Construction books there was paid to Buckman himself on account of the 14th Avenue work, by Hyman, in several installments, a total of \$788.00 on account of the grading contract. The amount of this grading charge against Hyman can be readily ascertained from the books above referred to, and the arbitrary finding that voucher No. 2239 to Hyman for \$1,419.00 is the grading charge, is not sustained by any evidence whatsoever, nor is the fact that a bill was issued to Hyman for \$1,419.00 any proof that the full amount of this was paid. The Hyman account shows that \$788.00 of the grading bill was paid to Buckman himself; and the account does not show that any grading charge was ever paid to Mr. Rauer. The books show the receipt by Mr Rauer of only two checks from Hyman, viz.: \$250.00 and \$750.00, but this was distinctly on the paving contract, which had been entered into after the insolvency and performed by Mr. Rauer. Therefore none of this \$1,500 and interest charged against Mr. Rauer should be so charged against him.

Line 22, page 19, states check of Meyer for \$3,-148.04 was turned over to Mr. Rauer on May 25, 1915, and he is charged therewith. The facts with reference to this are the following:

Two checks were given to Mr. Moran, one by H. Meyer [86] for \$1,398.04
and the other one from S. Meyer for 1,750.00

\$3,148.04

This was in payment for grading, sewerage, curbing and paving of 175 feet and 180.5 feet front at \$10.00 per running foot, under private contract to E. Moran, and which Mr. Moran split into three parts, performing the sewerage himself, assigning the grading to the Sunset Construction Co., and assigning the paving contract to Mr. Rauer, all after the insolvency of Buckman.

The paving was charged for at 26¢ per square foot. 355.5 ft. in length by 20 ft. in width, would make 7,110 sq. ft., which @ 26¢ per sq. ft. would be \$1,848.60

and 355.5 ft. curbing at \$1.35 per ft. would be 479.92

This would make a total for curbing and _____
paving of \$2,328.52

This Buckman of the Sunset Construction Co. never had anything to do with, and therefore the present account cannot be concerned therewith.

The full amount of the checks was 3,148.04

The amount Mr. Rauer was entitled to for
paving and curbing was 2,328.52

The difference is the sum of 819.52

If the theory of the Master be correct that Mr. Rauer is to be charged for any of his collections which could possibly be considered as coming from the grading contract, the only sum that he could be so charged with on these Meyer checks is \$819.52.

But the facts concerning the Fourteenth Avenue contracts and collections show that the persons from whom Mr. Rauer's paving bills were to be collected

were to quite an extent identical with those from whom the Sunset's grading bills were collectible, and that Mr. Buckman in collecting the grading bills was not over particular about confining himself to those, but also collected from some of these parties amounts owing to Mr. Rauer for the curbing and paving bills, and that because thereof Mr. Rauer collected the whole bill from Messrs. Meyer, so as to balance this against the collections on the paving bills made by Buckman for the Sunset from some of the others.

The following is Mr. Rauer's account for that job showing the charges for curbing and paving, and the amounts actually collected by or for him, and showing that, taking into account the extra \$819.52 collected from Messrs. Meyer, Mr. Rauer is still a loser on the Fourteenth Avenue collections of \$40.20, viz.: [87]

	Charge for Curbing and Paving
Webb	\$ 166.25
Ryder	319.20
Reva	322.21
Babbitt	366.51
Maloney	319.20
Katz	207.80
Jordan	157.50
Lathrop	198.75
Gardius	215.93
Solari	198.75
Getz & Sons	1,043.36

M. Baker)	210.00)
Hyman)	1,969.00)
Dufour	40.00
Henry Meyer)	
S. Meyer)	2,328.52
C. R. Russell	196.00
Tarpey	336.00
Corking	198.75

 8,793.73

 8,753.53

 LOSS to Mr. Rauer 40.20

Amt. Rec'd by Mr. Rauer or Others	Difference Collected by Sunset	Difference Collected by Rauer
\$ 137.50	\$ 28.75	
306.70	12.50	
322.21		
366.51		
250.00	69.20	
167.50	40.30	
83.65	73.85	
145.00	53.75	
160.00	55.93	
148.81	49.94	
1,043.36		
1,179.00 Graham		
1,000.00 Rauer		
40.00		
3,148.04		819.52

195.00	1.00
30.25	305.75
30.00	168.75
<hr/>	<hr/>
8,753.53	859.72

Lines 8-11, p. 19, the Master charges check from Webb (May 20, 1915, for \$137.50) to Rauer. The facts concerning that are these:

Webb's grading bill was \$125.00; this Buckman himself collected for the Sunset on Feb. 3, 1915 (See Sunset book 2, also book 1, p. 338). Webb's paving bill was \$166.25, and on May 22, 1915, Rauer collected thereon \$137.50.

The fact about the Dufau check of \$20.00 is that it was in part payment of a \$40.00 job assigned long before the insolvency, [88] and performed on a lot on 15th Avenue, and is not connected with the Fourteenth Avenue contract.

The facts about the Rider check (Master's report, p. 19, line 21) are these: Rider's grading bill was \$250.00, and for this he gave Buckman for the Sunset a note; Rauer's paving bill was \$319.20, and on this Rauer collected the \$306.70 check which the Master now says should be charged against him. (See Sunset books.)

Lines 5 to 11, page 20. Here the Master charges Mr. Rauer with \$400 and \$800 out of the following payments, viz.: \$1,043.36 and \$521.38 from Getz, \$83.75 from Jordan and \$160.00 from Gardizer, simply because Mr. Rauer delivered up two checks dated prior to Feb. 19th, on account of these payments, one for \$400 and one for \$800. The Master

states that the Getz payments were all for paving—and this is the fact. This is also the fact as to the Jordan payment. This is also so with the Gardizer payment, the full facts of which are these:

Gardizer's grading bill was \$149.00, and the curbing bill \$28.00, and Buckman collected both these amounts for the Sunset, one on June 2, 1914, and the other on June 3, 1915; and he also collected on July 1, 1916, Rauer's paving bill of \$215.93, and only paid to Rauer the \$160.00 thereof, which the Master now charges to Rauer. This looks like rubbing it in. It is fortunate perhaps that Buckman kept the rest of the \$215.93, for if he hadn't the trustee would certainly want to charge Rauer with that also.

These checks were in no instance for grading work, but in every instance only for paving contracted for and done after bankruptcy by Mr. Rauer, and are Mr. Rauer's own property which cannot enter into the account in any way. (See Getz's account in the Sunset Construction books,—also Jordan's account, book 2, page 12, and book 2, page 398, also Gardizer's account, which show that the amounts collected by or paid to Mr. Rauer were only for paving and curbing, and that the Sunset Construction Co. itself got all the payments for grading.) [89]

To sum up the Fourteenth Avenue contract matter:

Of the \$7,323.00 charged to Mr. Rauer by the Master on account of these items, the only amounts which could possibly be chargeable against Mr.

Rauer on the theory that the grading bills collected by him were assets of Buckman, could be the following, viz.:

March 11, 1915, collected from city.....	\$495.06
May 25, 1915, Dufau check for	20.00
a/c Meyer checks	819.51
<hr/>	
Total	\$1,234.57

But this grading contract was assigned to Mr. Rauer months before the bankruptcy of Buckman, and all collections thereunder absolutely belonged to Mr. Rauer to apply in accordance with the assignment, which he did; they were his moneys for that purpose, and if he mistakenly credited some of these on checks dated prior to Feb. 19, 1915, then instead of charging them over again to him, he is entitled to correct his mistake and charge that amount against his current account, which would leave the balance owing him on February 19th, just that much more.

And this leads us to once more survey the position taken in the Master's report that the date of Buckman's bankruptcy, February 19, 1915, is the time beyond which none of the dealings between Mr. Rauer and the Sunset Construction Co. can go, even though upon the dealings since that day the company owes Rauer a balance of \$18,614.54; and that all the moneys which Mr. Rauer collected after that date upon contracts assigned to him at any time before that date (no matter how long) must be charged against his account previous to Feb. 19, 1915, even though Rauer had given the

Company the cash therefor presently, or credit upon his current account after Feb. 19, 1915, and that also all moneys with which he took up any checks dated prior to Feb. 19, 1915, were to be charged against him in his transactions previous to Feb. 19, 1915, though they came from dealings entirely subsequent to and disassociated from the insolvency, and he had a right to apply them upon his accounts after Feb. 19, 1915. In other words the trustee intends to get Rauer both coming and going; consistency bothers him not. Quoting [90] from the Master's report (page 16, lines 17-25):

“As I have stated, that company continued doing business and its relations with Rauer continued exactly as if no bankruptcy of Buckman had occurred. Collections were made upon contracts completed before bankruptcy. Some of the money was either collected by or immediately turned over to Rauer. The moneys received were applied by him not only for current interest, but in cancellation of loans, and the application was indifferently made to loans prior to the bankruptcy date and to loans subsequent thereto.”

The Master here fully recognizes the *bona fides* of Mr. Rauer's position and dealings. Mr. Rauer in none of his transactions dealt with Buckman personally, but only dealt with the corporation, and considered no doubt that the only matter Buckman's insolvency could affect was the ownership of the Buckman stock. And in this he was legally correct. And if the trustee takes a different posi-

tion, he should at least take a consistent one, viz.: either, that the transactions ended Feb. 19, 1915, and all contracts of the Sunset then made became *ipso facto* by Buckman's insolvency the property of the trustee, and that likewise all claims then against the Sunset became *ipso facto* the debts of the bankrupt estate; in which event the collections made by Rauer on contracts entered into subsequent to that date are Rauer's to be credited on the Sunset Construction Co's current accounts, and not on those of the bankrupt estate; for such collections and the right to apply them on the Sunset's accounts are Rauer's property and not the trustee's, and if Rauer applied some part thereof upon the debts owing him prior to Feb. 19, 1915, it must be recognized that he did so under a mistaken thought that he was applying them on the debts of the Sunset Construction Co., whereas he was thus in fact applying them on the debts of the bankrupt's estate or, the trustee must take the position that the debts previous to Feb, 19, 1915, do not, by Buckman's insolvency, *ipso facto* become the debts of the insolvent estate, but continue the debts of the Sunset Construction Co., and in which case the assets of the Sunset Co. would likewise not become *ipso facto* the assets of the [91] insolvent estate, but would also continue the assets of the Sunset Co., and in which event the accounts cannot stop at Feb. 19, 1915, but must be settled, both for debits and credits between the Sunset and Rauer, as of the end of their dealings.

Page 20, lines 1 to 4, the Master charges against Mr. Rauer four different items amounting to \$1,-707.20.

As the first item, "Academy of Science \$300," the facts are these:

Mr. Rauer finished, in July 1915, the contract for the Academy of Sciences, on which it had held out \$300.00. Mr. Rauer expended on this matter and paid on Aug. 5 and 9, 1915, so that he might be entitled to the \$300.00, the following sums:

Pay roll	\$298.60
.. Stock hire	252.00
	<hr/>
Total	\$550.60
Amount received	300.00
	<hr/>
LOSS to Mr. Rauer ..	\$250.60

[92]

Surely there is no reason for charging Mr. Rauer with this \$300 when he actually lost on that contract \$250.60.

As to the item of Reeder & Foster, \$407.20, the facts are these:

The black book, page 31, shows this \$407.20 to have been paid by the Sunset Construction Co. to Cramer; Rauer received not one cent of it, and surely should not be charged with it. That transaction was in July, 1915, and Mr. Rauer had nothing whatever to do with it.

The Bosworth bill was \$500, but all that Mr. Rauer ever collected on it was, on a compromise, \$400.

The Iverson matter Mr. Rauer himself charges against his account in his statement, page 6.

To recapitulate matters, p. 21, line 23, to p. 22, line 4:

The only items which Mr. Rauer can possibly be charged with under the theory of the Master, are the following:

Bosworth	\$400.00
Iverson	500.00
	<hr/>
	\$900.00

instead of the \$1,707.20 charged.

Page 22, line 5, to page 24, line 30:

The Taraval Street contract was a public contract awarded to Mr. Rauer, and he agreed with Sunset Construction Co. that for the use of the equipment, the profits of that contract would be credited on the balance owing to Mr. Rauer from the Sunset Construction Company. There were no profits on this job, but instead there was a loss of \$804.33.

The Trustee is forever blowing hot and cold. He failed to exercise the control over the Sunset Construction Co. which his ownership of the bulk of the stock entitled him to; but instead permitted the old officers thereof to conduct its affairs, which [93] they had a perfect right to do as far as everybody, and particularly third parties, were concerned, until their successors were properly elected or chosen. These officers make a contract with Rauer under which they were to receive the profit, if any, otherwise nothing. Rauer loses, and the Trustee comes in a year and a half afterwards and repudiates the

contract, and wants to charge Rauer rent for the equipment. But he is equally as late in making any move in the Federal Construction Co. job, and because there is a profit, he concludes a year and a half afterwards, after all the risks have been run and the profits made, to declare himself in on all the profits by, at that late day, repudiating the assignment to Rauer by the Sunset Construction Co. of the Federal Construction Co. contract. Is this justice? Is this right? Is this in accordance with any principle of equity ever enunciated?

Such a situation only emphasizes the more the fallacy of the theory that the corporation was *ipso facto* thrown into insolvency. The Bankruptcy Act provides for insolvency proceedings in the case of corporations directly; and no indirect act is tantamount thereto or can take the place thereof.

But again accepting for the sake of argument the Master's position, we will point out the inconsistencies in the Master's findings even therewith:

Previous to February 19, 1915, Sunset Construction Co. was using 3 sand machines, for which Rauer was paying to Edward E. Ball et al. \$100 per month rental for the use of the patent. August 15, 1916, Mr. Rauer bought this patent from Mr. Ball et al., and on the same day had an agreement with Buckman wherein the latter obtained an option to purchase the patent for these machines. But Buckman never consummated this option, so the matter of the 3 sand machines stands in this position: The Sunset Construction Co. was obligated for the rent of the patents at \$100.00 per month,

payable to A. E. Ball et al. until Aug. 15, 1916, and thereafter to Mr. Rauer. This \$100.00 per month is about $\frac{1}{4}$ of the \$375.00 fixed by the Master as the reasonable monthly rental of the whole equipment. [94]

The Master holds that Mr. Rauer gave Buckman an option to purchase the equipment. This is a mistake. The option is in writing and is in evidence, and only relates to the patents of the sand machine. The full equipment was inventoried December 5, 1916, by W. A. Clark, John Jardine and M. R. Mackall, at \$4,934.60.

The total rentals charged against Rauer are:
For the time he used it on his

contract	\$1,312.50
For rentals collected from others	2,461.13

\$3,773.113

Less $\frac{1}{4}$ for rental of patent

rights	943.28	\$2,829.85
--------------	--------	------------

And taking from this the cost

of repairs	2,066.68
------------------	----------

Leaves the net balance.....	763.17
-----------------------------	--------

For, to put the equipment in

shape so it could be used at

all, Mr. Rauer expended....	\$2,066.68
-----------------------------	------------

The Master holds Mr. Rauer is not entitled to this because a mortgage can only store the property, —he is not entitled to use it or repair it. If the

Trustee is to get the rental, the benefit of its use, he must by every rule of logic, law, and reason pay or allow for the repairing of the property that permits it to be thus used.

Furthermore, the repair of the property certainly preserved and enhanced its value; and when mortgaged property is sold under foreclosure this added value insures a greater price, which greater price is credited on the obligations of the mortgagor. The mortgagor is the person who gets the value of these repairs in either case; and he who receives the benefits should pay the price.

Furthermore, the taking of possession by a mortgagee under a mortgage clause which permits this, is not an adverse taking, but, instead, one directly in response to the contract; so are the subsequent foreclosure proceedings and sale—all arising out of the contractual relations of the parties, the same as a direct sale would have been. At no time was Mr. Rauer's possession adverse, and certainly every principle of fair dealing would dictate that he be allowed for his repairs and betterments. These repairs and betterments amounted to \$2,066.68.

But the \$2,461.13 rentals Mr. Rauer collected from others, he [95] collected under a contract made by him with the Sunset Construction Co., through its regularly constituted and functioning officials under the terms of which contract Rauer was to give the company credit on his current advances to the company; and this he did; and he had a right to give this credit against any current bills; and he should not now be again charged with it or be com-

pelled to give another credit against the balances outstanding on Feb. 19, 1915. This all happened after that date. None of these so-called rentals are chargeable against Mr. Rauer otherwise than he has already charged them in his accounts after Feb. 19, 1915.

Pages 25-31. Federal Construction Co. contracts.

These were contracts between the Federal Construction Co. and the Sunset Construction Co. The Sunset Construction Co.'s part was in writing assigned to Mr. Rauer on January 25, 1915, by the Sunset Construction Co. through its regularly functioning officers. By the terms of this assignment Mr. Rauer was to carry through the contracts, advance necessary moneys, and credit the Sunset Construction Company with the net profits, after the payment to Rauer of $11\frac{1}{2}\%$ a month on his advances, which credits were to be made on its current account with him; the Sunset Construction Co. also agreeing to furnish the services of Buckman as superintendent, for which the Sunset would pay Buckman. Work under these contracts was not begun until March, 1915, and it was not completed until 16 months thereafter; and never during any of this time did the Trustee assert his right as majority stockholder in the Sunset Construction Co. to change the officers of that corporation or take charge of its business. But he waited not only until the contracts were fully completed, but also the moneys collected by Mr. Rauer and the net profits thereof by him properly applied upon the current account.

[96]

These contracts were assigned to Mr. Rauer before Buckman filed his petition; and can it be seriously contended that in December, 1914, or January, 1915, the officers of the Sunset Construction Co. were affected by a petition which Buckman might file in February, 1915, so that they or the corporation could not function? The absurdity of the proposition supplies its refutation.

The Sunset Construction Co. had a perfect right to make these contracts with the Federal in December, 1914; it had a perfect right to assign them to Rauer in January, 1915, and Mr. Rauer has a perfect right to enjoy the full fruits thereof in accordance with the terms of the assignment contract; and having accounted to the Sunset Construction Co. for the net profits by crediting the same on his current account, he should not now be forced to either pay it over again by giving it to the Trustee, or to apply it over again by charging it against the account previous to February 19th.

One of the elements of these contracts was the services of Buckman. The Trustee could not have compelled these—was not entitled to them—except as he could control the business of the Sunset Construction Co. through the agency of his ownership of the Buckman stock—and then only as the corporation, and in the fulfillment of its contracts.

Again: In the performance of these contracts the Sunset Construction Co. was represented by Buckman, its manager, and Buckman himself collected \$2,212.78 of the moneys payable thereunder in checks made out to the Sunset Construction Co.

by the Federal, and except as he used these moneys he received no pay for his services.

But in accordance with the Master's report these contracts belong to Buckman's trustee, and Rauer must account to this Trustee for all the moneys Rauer collected. If they *ipso facto* and entirely belonged to Buckman's trustee, and not to the Sunset Construction Co., and Rauer's rights to execute them had thereby terminated, and the Trustee could wait 1½ years and then declare himself in, then it might follow that Rauer wrongfully holds the moneys that came into his hands; but would he also wrongfully hold the moneys in his hands that didn't come into his hands? The Master so holds in his report, for he says, Rauer must also pay over [97] the moneys that came into Buckman's hands, that Buckman himself collected, and which were never paid over to Mr. Rauer. Mr. Rauer, according to this, must not only turn over that which rightfully belongs to him, but also that which he never got.

Again, the total payments under these contracts, whether Rauer got them or the Sunset or Buckman got them, are charged against Rauer, and the only thing that is given back to him is the actual money and team hire Rauer himself advanced to pull these contracts through, some \$7,395.97, and he is denied credit for a \$350.00 payment to H. M. Anthony for making the collection for the Federal, and \$300.00 paid by Rauer for rent for premises where the plant was installed for this work, and he is denied his 1½% per month interest on these advances which he was to receive therefor and for his time in

connection therewith under the terms of the assignment contract; and after all the risks have been run and all the work has been done, and all the moneys collected, the Trustee comes along and declares himself in, a year and a half after the work was started, not only for the profits, but for the full receipts; and he is not satisfied with trying to collect them from the people who got them, but wants to get them all from Rauer, and besides allow Rauer nothing whatever for interest for his risk or his time or for the moneys he paid out for rent of premises for the plant that did the work or for services he was compelled to pay for to make the collections.

All of which only emphasizes the fallacy of the Trustee's position that the Sunset Construction Co.'s existence and functioning as a corporation, and its assignment to Rauer, on January 25, 1915, of its contracts of December, 1914, can be directly affected by Buckman's insolvency on Feb. 19, 1915, and that the filing by Buckman of his individual petition in insolvency amounts to a filing of the corporation's petition in insolvency simply because he happened to be the owner of most of its capital stock.

All the moneys that Mr. Rauer received under these Federal Construction Co. contracts was \$8,409.80 on August 12, 1916, and he is entitled first to his interest out of this at $11\frac{1}{2}\%$ per month for 11 mos. for the \$2000 he advanced on January 15, 1915, which would be.....\$330.00
[98] and on the moneys he paid out for team hire (\$5190.45 bet. Jan. 15, 1915, and May 29, 1916, 16

mos., or an average of 8 mos.), and from May 29th to Aug. 12th (the date of payment) 2½ mos. more, which would amount to\$817.42 and for the rent he paid for place where

plant was installed\$300.00 and for the money paid for collection of the account\$350.00

altogether\$1797.42

The amount received by Mr. Rauer

was\$8,409.80

Taking from this the interest and

amounts paid out.....1,797.42

would leave the net profit on the

Federal Construction Co.

job\$6,612.38

This net profit he was entitled

to apply on the Sunset's cur-

rent account which he did. [99]

It will be remembered that outside of the balance of \$37,734.65 which the Sunset Construction Co. owed Mr. Rauer on February 19, 1915, it owes him for moneys advanced since that date another balance of \$18,614.54 after he has applied the full sums accountable for by him on the Taraval contract, the Fourteenth Avenue contract and the Federal Construction Co. contracts, in exact accordance with the assignment contracts made therefor between Mr. Rauer and the Sunset Construction Co. And having so accounted for and applied the moneys coming from these various contracts, Mr. Rauer

should not be compelled to pay them over again by giving them to the Trustee or crediting them against the balance owing him on February 19, 1915.

If Mr. Rauer be compelled to credit over again the \$2,461.13 rentals for equipment collected by him, this should be reduced by $\frac{1}{4}$, that is to \$1,845.85, because of the use of the patent rights on the sand machines, and the balance would be entirely wiped out by the \$2,066.68 he paid in reconstruction and repairs. And surely Mr. Rauer should not be charged with a $3\frac{1}{2}$ months' rental for the Taraval job for which he contracted with the Sunset Construction Co. previous to the insolvency to credit the Sunset with the profits, and there were none, but there was a loss instead. On this latter the Master has charged against Mr. Rauer \$1,312.50, which is therefore not chargeable, although if it were $\frac{1}{4}$ or \$350.00 thereof would have to be deducted therefrom for the use of the sand machine patent rights.

On the Fourteenth Avenue contract the Master charges \$7,323.00 against Mr. Rauer, on the theory first, that the grading contract was performed before Feb. 19, 1915, and therefore was an asset of the insolvent estate; and, second, that the way to ascertain what portions of Rauer's collections was for grading was to figure the amount of checks dated prior to Feb. 19, 1915, that Rauer had delivered up on account of these collections on the whole contract which embraced besides the grading, the curbing and paving. We have shown that the actual amount the books and accounts show Rauer collected

on account of the grading does not exceed \$1,234.57, and that that grading contract and the bills therefor had been assigned to Rauer many months before the Buckman insolvency, and therefore belonged to Rauer to be applied against the current account of the Sunset Co. and not against the debts [100] owing by the bankrupt estate (if the theory of the Trustee is correct that everything of the Sunset up to Feb. 19, 1915, *ipso facto* became a part of the insolvent estate). And if Mr. Rauer mistakenly credited these collections, or collections made on his paving contracts or other contracts entered into after Feb. 19, 1915, against the balance owing him on Feb. 19, 1915 (which, if the Trustee is to be consistent with his contention, is the debt of the bankrupt estate), then Rauer was simply mistakenly giving his property to pay the debts the bankrupt estate owed to him. Perhaps the Trustee will now join us in our view that this demonstrates the absurdity of the contention that the corporation is *ipso facto* thrown into bankruptcy, without a direct proceeding by Buckman filing his individual petition.

We have seen similarly that the miscellaneous items charged Mr. Rauer (pp. 21-22 Master's report) in the sum of \$1,707.20, could not amount to more than \$900.00, and that this has been properly credited by Mr. Rauer in accordance with his definite contracts with the Sunset Construction Co. long previous to the date of the insolvency of Buckman.

As to what the real balance owing to Mr. Rauer by the Sunset Construction Co. was on February 19, 1915, and that the \$7500 credit for the mortgage equity wiped out the \$8000 balance on the \$15,000 note, and should not again be charged against Mr. Rauer's balance of February 19, 1915, we think has been shown to a demonstration in the opening pages of this analysis.

The Sunset Construction No. 1 was duly incorporated April 13, 1910. It failed to pay its license tax and lapsed Nov. 30, 1911.

Thereupon the Sunset Construction Co. No. 2 was duly incorporated Dec. 12, 1911, and immediately started to function, and continued to so function until the end of Mr. Rauer's dealings with it. There has been some claim that its stock certificates were not in the regular form; but it has been repeatedly held by the Courts that a subscription to the stock makes a person a stockholder, and [101] that no certificates of stock need be issued to make the subscriber a stockholder, and that a subscription made in contemplation of the organization of a corporation may be enforced by the corporation after it is organized, and that this puts the corporation in the position of having stockholders the instant the copy of its Articles is filed by the Secretary of State.

(See Clarke on California Corporations, pp. 34, 35, and the many cases there cited.)

And even where there is a question of due organization (which there is not here) it has been held that it does not necessarily result in a partner-

ship or a joint stock company, but usually in a *de facto* corporation.

Supra, pp. 64, 65, and cases cited.
and on the same page:

“If the corporation claims in good faith to be legally incorporated and is doing business, it is sufficient.”

“A corporation *de facto* may legally do and perform every act and thing which the same entity could do or perform were it a *de jure* corporation. As to all the world except the paramount authority under which it acts and from which it receives its charter, it occupies the same position as though in all respects valid, and even against the state except in direct proceedings to arrest its usurpation of power, it is submitted its acts are to be treated as efficacious.”

And again, *supra*, pp. 68, 69, and cases cited:

“What is a corporation *de facto*? It exists when a number of persons have organized and acted as a corporation; have put on the habiliments of a corporation; have assumed the form and features of a corporation; have conducted their affairs to some extent, at least, by the methods and through the officers usually employed by corporations; have assumed the appearance, at least, of the counterfeit presentment of a legal corporate body. *Quo warranto* is the proper and only proceeding to test the right to a franchise to exist, or to procure a judgment of its forfeiture.”

The Trustee here seeks the benefits of the contracts made by the corporation and its officers.

Again, *supra*, p. 66: [102]

“A party who has had the benefit of a contract with a corporation cannot question either its *de jure* or *de facto* existence.”

The Trustee in his scramble to upset the facts in this case, may wish to say that since the filing of Buckman's petition on February 19, 1915, vested the ownership of the Buckman stock in the Trustee, and that Buckman thereby ceased to be a stockholder, he could no longer function as a director and officer. In this too, the Trustee would be mistaken; for, let alone the Trustee's failure for a year and a half to assert his ownership and right to control, and his consequent acquiescence in the acts of the officers and agents of the corporation and holding them out as such, it has been held that

“A director who ceases to be a stockholder during his term, but continues to act, is a *de facto* director until he is ousted in a direct proceeding for that purpose, and his acts are valid as to third persons; and a director holding over is a *de facto* director.”

(See Clarke on California Corporations, p. 221 and cases cited.)

The Trustee claims the benefits of the acts of the Sunset Construction Co. and its officers prior to Feb. 19, 1915; and for that reason alone he could not question its existence, or the acts or rights of its officers up to that date. And for the other reasons

stated above he cannot question the corporation's existence or the acts of its officers or their right to act as such after Feb. 19, 1915, and until the end of Mr. Rauer's dealings, with it and them.

Respectfully submitted,

H. M. ANTHONY,

Humboldt Bank Bldg., S. F.

GRANT & ZIMDARS,

1212 Merchants National Bank Bldg., S. F.

[Endorsed]: Filed Aug. 27, 1921. H. M. W.,
Sp. M. Filed Dec. 12, 1921. W. B. Maling, Clerk.
By J. A. Schaertzer, Deputy Clerk. [103]

(Title of Court and Cause.)

Special Master's Petition for Compensation.

The petition of H. M. Wright, formerly standing Master in Chancery and later Special Master in Chancery of this Court, respectfully shows:

By the interlocutory decree herein an accounting was ordered by the undersigned as Standing Master of this Court and upon my resignation as Standing Master, the order of reference was continued to me as Special Master and my report was filed on December 12, 1921. No compensation has been paid to the Master and no order made in regard thereto.

With regard to time employed, the matter was pending before me for a period of about four (4) years, during which time testimony was taken originally and again after reopening for that purpose. Several arguments were had and a large

number of briefs filed. In all, the transcript of the proceedings before the Master covered 523 pages and this, with thirty-five pages of proceedings before the Court was read and 457 pages of briefs and arguments, a total of 1026 pages. The solid time employed was 12 days in taking testimony and 30 days in making the report, a total of 42 days.

With respect to the amount involved, the plaintiff, Trustee in Bankruptcy, claimed that there was owed to the bankrupt estate by J. J. Rauer approximately \$32,000.00, and on the contrary the defendant Rauer claimed that there was due to him from the estate the sum of about \$38,000.00, so that the amount involved can be considered to be \$70,000.00. The report finds, speaking from memory, that there is due the estate from Rauer about \$9,000.00 and due Rauer from the estate about \$13,000.00.

With respect to the difficulty of the reference I state [104] that, without qualification, this reference presented more difficulty of determination than any other reference, even those that took longer to present and determine, in an experience of eleven years as Master of this court. There were numerous difficult questions of law, but above all was the difficulty in determining the facts from the evidence submitted to me. This evidence consisted not merely of the written testimony, but of a great number of books of account, books of reference, checks, slips of paper, contracts and memoranda of all sorts. The transcript of testimony is difficult to follow, the books of account were un-

skilfully and incompletely kept. The fault of this in inadequate presentation of the evidence must be laid at the door of the defendant Rauer, though I do not believe that it was intentional on his part. Inevitably this resulted in longer and harder work on the part of the Master in completing the report.

Under all the circumstances, the Master believes and represents that a just compensation for his services would be the sum of Five Thousand (5,000) Dollars and that said sum would be reasonable; that a minimum compensation would be Forty-two Hundred (4200) Dollars. With respect to the party against whom it is charged, it is apparent that the usual practice of this Court should be followed and that it should be charged against the accounting party, namely the defendant, J. J. Rauer. The justice of following the usual practice is apparent when it is considered that the Trustee in Bankruptcy is understood to have no funds in possession and the amount found due to him from the defendant Rauer ought not to be depleted to the loss of the creditors in bankruptcy.

WHEREFORE, petitioner prays that this Court make its order fixing Master's compensation in the sum of Five Thousand [105] (5000) Dollars; that the amount to be paid by defendant J. J. Rauer, within ten (10) days from date of the order.

Respectfully submitted,
H. M. WRIGHT,
Special Master.

[Endorsed]: Filed Jany. 11, 1922. Walter B. Maling, Clerk. [106]

In the Southern Division of the United States District Court, in and for the Northern District of California.

IN EQUITY—No. 233.

GEORGE J. HATFIELD, Trustee in Bankruptcy
of the Estate of A. E. Buckman, Bankrupt,
Plaintiff,

vs.

A. E. BUCKMAN, Bankrupt, J. J. BAUER, WM.
H. CHAPMAN, FILMORE BUCKMAN, J. A.
MEADOWS, and SUNSET CONSTRUCTION
COMPANY, a Corporation,

Defendants.

Objection to Special Master's Petition for Compensation.

To the Honorable Judge of the United States District Court:

Comes now the defendant J. J. Rauer and files the following objections to the petition of the Special Master for compensation, and which petition was filed herein, and a copy served upon this defendant January 10, 1922, viz.:

The Master states that he has spent 12 days in taking testimony and 30 days in giving consideration thereto and making his report, or a total of 42 days, and he asks therefor compensation in the sum of Five Thousand Dollars (\$5,000) and he asks that his compensation be charged against defendant J. J. Rauer.

Defendant J. J. Rauer objects both to the extent of said compensation, and to the same, or any part thereof, being charged against him, and in that respect represents as follows:

That it appears from this defendant's objections to the Master's report herein referred to, and from said report and the testimony [107] in said matter, and from the order of reference herein, that this defendant was dealing solely and alone with the Sunset Construction Company, which was, at all the times that this defendant was dealing with it, a duly incorporated and organized and existing and functioning corporation, of which the bankrupt A. E. Buckman owned all the stock, except the qualifying stock to the other directors.

That said corporation has never been declared a bankrupt, and no bankruptcy proceedings have ever been initiated against it.

That said corporation owed to this defendant at the time of the bankruptcy of said A. E. Buckman, large sums of money, stated by him to be in excess of Thirty-six Thousand Dollars (\$36,000), which even the Master finds were at said time in excess of Eighteen Thousand Dollars (\$18,000); and that in this defendant's subsequent dealings with said Sunset Construction Company said corporation became indebted to him to the extent of over Eighteen Thousand Dollars (\$18,000) more, and is so indebted to him at the present time in excess of the sum of Thirty-six Thousand Dollars (\$36,000).

That the Master refused to take into account this defendant's account with said corporation, except up to the date of said Buckman's adjudication as a bankrupt, and took the position that since said Buckman was the owner of practically all of the capital stock of said corporation, that therefore the application by this defendant of his subsequent receipts from the corporation upon this defendant's debts, should not be permitted, but that the corporation's money, which it had so permitted him to apply upon the corporation's debt to him, should be paid over by this defendant to the trustee in insolvency of A. E. Buckman, and these receipts the Master states amounted to the sum of Thirteen Thousand Twenty-three and 19/100 Dollars (\$13,023.19).

This defendant further represents that according to the evidence, and even according to the Master's report, this defendant's dealings with said corporation were in the full belief that he had the right to deal [108] with said corporation as a separate entity unaffected by the insolvency proceedings against A. E. Buckman personally, and that his dealings with said corporation were fair and above board, and that he paid value to this corporation for everything that he received from it, and, in fact, said corporation is at the present time indebted to him in excess of \$36,000, even after the application of all he received from said corporation.

This defendant further represents that the Master's statement that the amount involved in this

litigation was \$70,000 is misleading. That it is true the trustee in bankruptcy made the claim that there was approximately \$32,000 owing by this defendant to the trustee of Buckman on account of this defendant's dealings with said corporation, but that the evidence shows that there is not a single cent owing from this defendant to said trustee, and that this even appears from the facts found by the Master; and that the evidence further shows that a serious injustice would be inflicted upon this defendant were the Master's conclusions and his petition herein given effect.

This defendant further represents that none of the creditors who have filed their claims in the above proceedings were creditors of, or in any manner connected with the transactions of the Sunset Construction Company; and that no notice was ever given to creditors of the Sunset Construction Company to file their claims herein, and that creditors of the Sunset Construction Company were never considered in these proceedings as creditors of Buckman; and that this defendant is a creditor of the Sunset Construction Company to the extent of over \$36,000, even after applying upon the indebtedness all the moneys received from the Sunset Construction Company, and that even according to the Master's report the total assets of the Sunset Construction Company were only \$13,023.19, and that \$9016.99 of this consists of rentals charged by the Master against defendant Rauer, and which arise out of this defendant's use of the very property that was mortgaged

to him as security for his \$36,000 balance, [109] and which personal property only sold for \$3701.22 and which \$3701.22 although belonging to this defendant, is impounded in this court in this action, and that this matter never involved \$70,000, but at most \$13,023.19.

And this defendant further represents that the claim here made by the Master for \$5000 compensation for 42 days' services is out of all proportion and reason; and that the highest paid judges of the Superior Court in the State of California only receive a salary of \$6000 a year for which they give at least 300 days' service in the year, or at the rate of \$20 per day, which for 42 days would be only \$840, and that the great majority of the Superior Court judges of the State only receive \$4000 per year, or at the rate of \$13 $\frac{1}{3}$ per day, which for 42 days would be only \$560; that the judges of the Supreme Court of the State of California only receive a salary of \$8000 a year, for which they give at least 300 days' services a year, or at the rate of \$26 $\frac{2}{3}$ per day, which for 42 days would be only \$1120.

That previous to the filing of the Master's petition herein asking for \$5000 compensation and for its charge against and immediate collection from this defendant, this defendant and his counsel were astounded at the Master's repeated reiteration of the great difficulties encountered by him in the making of his report and at his conclusions therein.

That the Master has entirely misconceived the meaning of the decree of reference, and has as a

consequence done unnecessary work, and that the evidence demonstrates that a week's time by a competent accountant would have sufficed to determine the status of the accounts.

And this defendant represents that the said order of reference is not yet final, and that therefore no order for immediate payment against this defendant could be made, as requested; and that the Master's petition for the charge of his compensation against this defendant proceeds upon the assumption that his report is already the judgment of this Court, whereas until final judgment is entered herein an order charging compensation against a party would have no foundation.

And this defendant further represents that the said exceptions and objections to said report, a copy of which is hereunto appended and made [110] a part hereof, are now pending before this court and undetermined, and that no charge should be made against any defendant until it is definitely determined that there is money owing from such defendant in favor of the party bringing the action; and this defendant verily believes that upon a consideration by this Court of this defendant's said exceptions and objections, the justice of this defendant's contention will be recognized by this Honorable Court and the conclusions of the Master will be overruled and set aside and not adopted as the judgment of this Court; and that the judgment of this Court will be that it appears even from the facts as found by

the Master that this defendant owes nothing to the plaintiff trustee for said A. E. Buckman, bankrupt, and that this defendant owes nothing to the Sunset Construction Company, but that instead the Sunset Construction Company is indebted to this defendant in excess of \$36,000 (which in itself will be a total loss to this defendant). That according to the Master's report said corporation owed this defendant \$18,746.22 on February 19, 1915, and the moneys he has received from it since amount to \$13,023.19.

It is submitted that the request for \$5,000 compensation asked for by the Master is most unreasonable; that the Master's report shows that Rauer has acted in good faith in all his dealings, and the liability which is fastened upon him by the Master is upon a technical construction of the law, and in no wise charges Rauer with intentional wrongdoing. That concededly according to the report, Rauer suffers a very great loss in any event; that the report shows that there are no assets of any kind pertaining to the bankrupt estate, other than the property right involved in this litigation; that there can be no recovery by Rauer of any of the costs or expenses of this litigation should it be finally determined that Rauer, instead of being liable to account, is entitled to a judgment against the plaintiff; that Rauer has already been to a very large expense, and the plaintiff, as trustee of a bankrupt estate, is under no liability to reimburse him for his [111] costs or outlays, except to the extent of assets that may come into

his hands,—and, as before stated, there are no assets apart from the sum that may possibly be recovered from Rauer in this present litigation.

It appears from the Master's report that his request for the \$5000 compensation is based upon his report that the defendant Rauer is liable to account; that the Master would not have made the request for the \$5000 compensation if his judgment had been in favor of Rauer and against the plaintiff.

While we disavow any thought of charging the Master with being consciously affected by the foregoing facts and by the circumstances that from Rauer alone could a fund be derived out of which the Master could be paid, yet, it is respectfully submitted that the foregoing matters, developing as they do a most delicate situation, should be taken into consideration by this court in ruling upon this matter of the Master's compensation.

WHEREFORE, this defendant prays that in fixing the compensation of the Master this Court take into consideration the matters and things here called to its attention, and that no portion of said compensation be charged against this defendant.

H. M. ANTHONY,
GRANT & ZIMDARS. [112]

In the Southern Division of the United States District Court in and for the Northern District of California, Second Division.

No. 233—IN EQUITY.

GEORGE J. HATFIELD, Trustee in Bankruptcy
of A. E. Buckman, Bankrupt,
Plaintiff,

vs.

A. E. BUCKMAN, J. J. RAUER, WM. B. CHAP-
MAN, FILMORE BUCKMAN, JOHN DOE
MEADOWS, and SUNSET CONSTRUC-
TION COMPANY, a Corporation,
Defendants.

**Exceptions of Defendant J. J. Rauer to Master's
Report.**

Comes now the defendant J. J. Rauer, and makes and files the following exceptions and objections to the report and the supplemental report of H. M. Wright, Esq., Standing and Special Master in Chancery, filed herein on December 12, 1921; the time for the filing of these exceptions and objections having been extended by stipulation and order of Court thereon to January 25, 1922.

To make clear these exceptions and objections there is made the following brief statement of the admitted and underlying facts appearing from the pleadings, files and records in this matter, and which pertain to all the exceptions and objections here stated, viz.:

That the bill of complaint filed herein December 1, 1915, alleges that "the defendant Sunset Construction Company is a corporation organized and existing under the laws of the State of [113] California," and "was organized as a corporation under the laws of the State of California on the 12th day of December, 1911"; and that "A. E. Buckman immediately became the owner of all the outstanding subscribed shares of the capital stock of said corporation with the exception of two shares, one each to defendant W. H. Chapman and one to J. Maury," and "that defendant W. H. Chapman is, and has been since the formation of said Sunset Construction Company, the president thereof, and defendant Filmore Buckman is, and has been since the formation of said corporation, the secretary thereof." These facts stand admitted.

That defendant A. E. Buckman was, on February 19, 1915, declared a bankrupt in a proceeding therefor voluntarily commenced by said A. E. Buckman.

That no proceedings in bankruptcy have ever been taken or initiated against the defendant Sunset Construction Company, and as found in the Master's report (lines 18 to 20, page 38) "the company was never declared a bankrupt, and its creditors have not been scheduled and notified to file their claims."

That defendant Rauer lent moneys to defendant Sunset Construction Company since its organization on December 12, 1911, and until August 1916, and took as evidences of said indebtedness from said corporation its promissory notes and checks, and

from time to time received from said corporation payments thereon and assignments of its contracts and accounts as payments thereon, and also on the 16th day of June, 1914, received from said corporation its chattel mortgage, mortgaging to him all of the personal property of said corporation as security for two promissory notes aggregating \$15,000.00, and other indebtedness. That after the giving of said promissory notes the only evidences of loans to it taken by defendant Rauer were the checks of the company, upon the understanding that he would hold them till the company had funds to meet them; [114] and as funds were forthcoming, he would deliver up these checks.

That defendant A. E. Buckman continued as manager of defendant Sunset Construction Company after his adjudication as a bankrupt on February 19, 1915, just as he had theretofore; and there was no change in the conduct of the business of said Sunset Construction Company because thereof, said company continuing to be not only a *de facto* but an actual, existing and functioning corporation thereafter and until the end of defendant Rauer's dealings with it.

That defendant Rauer continued to conduct his business with the Sunset Construction Company after February 19, 1915, in just the same way that he had conducted it before, and, as the Master finds (lines 23 and 24, page 38 of the report), defendant Rauer "believed himself entitled to deal with the company after Buckman's bankruptcy as a separate

entity not affected by his (Buckman's) bankruptcy."

That it is alleged in the bill of complaint herein that in January 1914, Buckman transferred his stock in said corporation Sunset Construction Company to J. J. Rauer presumably as a pledge to J. J. Rauer, and that Rauer subsequently transferred it to one Meadows, but that the stock actually belonged to Buckman.

That on the hearing before the District Court, the Court held that the transfer to J. J. Rauer of said stock by way of pledge was ineffectual, and that the stock therefore still belonged to Buckman, and that since the stock belonged to Buckman, it passed to Buckman's trustee in bankruptcy as of the date of his adjudication February 19, 1915; and the defendants herein were thereupon ordered to render accounts of their respective dealings with the Sunset Construction Company, a corporation, and the matter of such accounting was referred to H. M. Wright, Esq., by the District Court. [115]

That defendant Rauer then so rendered his account with said corporation Sunset Construction Company covering the whole period of his dealings with it, showing that said corporation was indebted to him in a large sum of money, and that the only security therefor that defendant Rauer held was the chattel mortgage of said corporation hereinabove referred to and executed on June 14, 1914, and assignments of accounts and contracts of said Sunset Construction Company.

That thereupon, however, defendant Rauer was directed by the Master to segregate his accounts so as to state the balance owing him on February 19, 1915, only, and further to render an account of all moneys he had received in his dealings with the Sunset Construction Company since February 19, 1915, growing out of any contracts of said corporation existing on said date or performed theretofore, and also of all sums received by him since February 19, 1915, for the use or rentals of the property mortgaged to him; and this without taking into account of how he had applied the same or of the moneys he had loaned or advanced to the Sunset Construction Co. since February 19, 1915.

That defendant Rauer thereupon filed herein as directed a segregated statement of his transactions with said Sunset Construction Company showing that the said corporation owed him on February 19, 1915, the sum of \$36,807.04, and that since February 19, 1915, and entirely independent of anything previous to said date, said Sunset Construction Company was further indebted to him, after giving it credit for all moneys received, in the sum of \$18,561.54. But, according to the Master's decision, defendant Rauer is not entitled to credit against the moneys owing him on February 19, 1915, or against the sums loaned or advanced by him to Sunset Construction Company since February 19, 1915, any moneys received by him since February 19, 1915.

The Master has found that defendant Rauer received sums [116] aggregating \$4,016.20 repre-

senting moneys earned by the Sunset Construction Company previous to February 19, 1915. This defendant Rauer disputed and claims that all but \$1,395.00 of these particular moneys so specified by the Master were earned after February 19, 1915, and were applied by him upon his account with the Sunset Construction Company.

The Master has also found that defendant Rauer received after February 19, 1915, sums aggregating \$9,006.99 as the result of the use and rental of the equipment mortgaged to defendant Rauer after February 19, 1915.

That the full amount of these sums so found by the Master to have been received by defendant Rauer from the Sunset Construction Company since February 19, 1915, is the sum of \$13,023.19.

Defendant Rauer represents that he did receive certain moneys since February 19, 1915, resulting from the use and the rentals of said personal property mortgaged to him, and that he had applied these sums both upon the repayment of moneys advanced to the Sunset Construction Company by him previous to February 19, 1915, and moneys advanced and loaned to it by him subsequent to February 19, 1915, and in reimbursement to himself of moneys expended by him in rebuilding and repairing and paying royalties on the very property with which he earned these rentals, but none of which moneys he is, according to the Master's recommendation permitted to apply or retain.

The Master further found that the Sunset Construction Company owed defendant Rauer on Feb-

ruary 19, 1915, the sum of \$18,746.22, and that the same has not been paid, and that defendant Rauer has not the right to offset said \$13,023.19 charged by the Master to have been so received by him since February 19, 1915, against said \$18,746.22 even though he was dealing with said corporation [117] Sunset Construction Company during said entire time as a separate entity unaffected by the Buckman bankruptcy proceedings, and even though, as a matter of fact, no bankruptcy proceedings had ever been instituted against said corporation, and it was an actual, existing and functioning corporation, and even though, as found by the Master, defendant Rauer's dealings with the corporation were in good faith and in the full belief that the corporation had an existence as a corporation apart from Buckman, and that he, Rauer, could legally transact business with the corporation, and was in fact dealing with said corporation as such. [118]

EXCEPTION I.

Defendant Rauer therefore excepts to the Master's report that the sum of \$13,023.19 found by the Master to have been received by defendant Rauer from the Sunset Construction Co., a corporation, since February 19, 1915, is payable by him to the plaintiff Trustee in Bankruptcy for A. E. Buckman, and submits that from the face of said finding that there was owing and unpaid to defendant Rauer on February 19, 1915, from the Sunset Construction Co. the sum of \$18,746.22, and that subsequently there has been received by him the sum of \$13,023.19 out of the assets of the Sunset Construc-

tion Company, it follows that there is nothing owing from defendant Rauer either to the Sunset Construction Co. or to Buckman's trustee. But that instead said report on its face shows that there is still owing to defendant Rauer from the Sunset Construction Company the difference between said balance of February 19, 1915,..... \$18,746.22 and said money so found to have been received by defendant Rauer since February 19, 1915, of..... 13,023.19 or the sum of..... \$5,723.03

And defendant Rauer assigns that the conclusion of the Master that said \$13,023.03 received by him from the Sunset Construction Company since Feb. 19, 1915, is not applicable to the debt owing him by that corporation, could only be correct if that corporation had been declared a bankrupt on February 19, 1915, and could not follow merely from Buckman's bankruptcy.

And this defendant further points out that even the Master apparently cannot escape the feeling that an injustice must follow from his deductions, as appears from what might figuratively be termed a *sotto voce* remark of the Master, where he says (p. 38 of his report):

“that Rauer must account to this trustee for [119] dealings with the company's assets owned on February 19, 1915, after that date, without the benefit of set-offs subsequently accruing. There are, of course, difficulties arising out of the fact that the company was never declared a bankrupt, and its creditors have not

been scheduled and notified to file their claims, and *that defendant Rauer will suffer loss by reason of the fact that he believed himself entitled to deal with the company after Buckman's bankruptcy as a separate entity, not affected by his bankruptcy.*"

EXCEPTION II.

Under the interlocutory decree made herein Sept. 11, 1916, defendant Rauer and the other defendants were directed to

"account for all moneys or property received by them from, or advanced by them to, defendant Sunset Construction Company since the 12th day of December, 1911, whether such transactions were made in the names of third persons, or in the names of said parties, for the purpose of determining what claims, if any, exist between said company and said persons."

And defendant Rauer excepts to the ruling of the Master refusing to consider his account of the moneys advanced by him to the Sunset Construction Company and by him expended for it since February 19, 1915, and which said moneys after the full application of the \$13,023.19 (so found by the Master to have been received by defendant Rauer since said date) still leaves a balance owing by the Sunset Construction Co. to defendant Rauer on the transactions subsequent to February 19, 1915, of the sum of..... \$18,561.54 and which said balance, when added to the balance found by the Master to have been owing to defendant Rauer as the

result of transactions previous to February 19, 1915, of..... 18,746.22
shows a total balance owing by said Sunset Construction Co. to defendant Rauer
of the sum of..... \$37,307.76

And defendant Rauer assigns that in this regard the [120] Master's report is also not in accordance with the order of reference and *is not a true statement of the claims as they "exist between said company and said" defendant Rauer.*

EXCEPTION III.

Defendant Rauer excepts to the report and finding of the Master that the indebtedness owing to him from the Sunset Construction Company on February 19, 1915, was only the sum of \$18,746.22; and in this connection defendant Rauer states that the indebtedness owing to him by the Sunset Construction Company was at said time the sum of \$36,807.04, and that this is proven by a vast preponderance of the evidence, by the books of the Sunset Construction Company, by the accounts furnished by defendant Rauer and by the testimony offered upon said matter. And that the Master has entirely disregarded each and every account furnished by defendant Rauer and of testimony offered, and has taken as the sole basis for said figure of \$18,746.22 a petition filed by this defendant in a matter entirely disconnected with the matter of this accounting, viz.: a petition for the sale of the personal property mortgaged to secure this defendant's advances to said Sunset Construction Company, and in which said petition the figure (\$26,246.22) which

is taken by the Master as the basis for this finding was mentioned as being the amount at said time of the balance owing to this defendant from the Sunset Construction Company upon *all the accounts secured by said chattel mortgage*; and that nevertheless, though the Master gives this statement in said petition as to the sum owing an overriding effect over all accounts and testimony, yet he entirely disregards the further qualifying recital in said petition that "said sum is [121] secured by the chattel mortgage hereinabove mentioned," and to further reduce the balance so shown to be owing to defendant Rauer he deducts therefrom the sum of \$7,500.00, which said \$7,500.00 was a balance secured by a *real estate mortgage* which was the subject of a separate and independent account and had theretofore been liquidated by defendant Rauer taking the equity of the real property mortgaged in full payment thereof; and that therefore, even taking said figure as the basis for the balance of the account owing to defendant Rauer by said Sunset Construction Company on February 19, 1915, the said balance so found by the Master as \$18,746.22 should be increased by \$7,500.00 and should have been stated as the sum of \$26,246.22 as owing to defendant Rauer from the Sunset Construction Company on February 19, 1915. His accounts carefully prepared and subsequently rendered and filed herein show the balance to be owing him from Sunset Construction Co. on said date to be \$36,807.04.

EXCEPTION IV.

Defendant Rauer excepts to the Master's finding

that he is accountable for and must pay to Buckman's trustee the following sums received from the Sunset Construction Co., and which the Master charges against him upon the theory that they are the collections by defendant Rauer of assets of the corporation existing on February 19, 1915, and for which defendant Rauer gave no present consideration, but which were applied by him upon his general accounts, viz.:

1915.

Mar. 11	1	City Warrant....	\$495.00
May 31		Check of Hyman...	750.00
" 24	" "	" " " ...	250.00
" 25	" "	Dufau....	20.00
" 25	" "	Ryder....	245.00
" 25	" "	H. Meyer...	649.00

[122]

\$2,409.00

Miscellaneous collections (report

pp. 22 and 47), consisting of:

Academy of Sciences.....	\$300.00
Reeder & Foster.....	407.20
Bosworth	400.00
Iverson	500.00

1,607.20

\$4,016.20

As to the following items included in the above, viz.:

March 11, 1915, One City Warrant.....	495.00
Bosworth.....	400.00
Iverson.....	500.00

These arose out of work completed by the Sunset Construction Company previous to February 19, 1915, and these accounts were assigned to defendant Rauer, whether before or after February 19, 1915, does not appear from the evidence, but they were collected by defendant Rauer after February 19, 1915; and defendant Rauer excepts to the Master's report charging these against him, for the reason urged in Exception I, to the effect that the Sunset Construction Company has not been declared a bankrupt and that he has given full credit for these collections upon the account of the Sunset Construction Company with him and should not be required to pay these sums to Buckman's Trustee; and for the reason that it does not appear that the assignments made to him were made after February 19, 1915; and also because, in the hearings had nearly five years after the event, when vouchers and books and memory had grown dim, and where hundreds of items were in evidence, and only for the few here mentioned defendant Rauer and the other witnesses and Mr. Rauer's and the Sunset Construction Company's accounts and books do not show the present consideration given by this defendant, that the presumption must nevertheless be indulged that, since as to all these hundreds of other items where they are not direct credits on the account this present consideration does appear, that therefore this was the [123] practice as to all. Yet this presumption was given no consideration by the Master, though the burden of proof is on the plaintiff trustee.

As to items:

May 31st Check of Hyman for.....	\$750.00
" 24th " " " "	250.00

On page 45, lines 25 to 30, the Master concludes that these checks received by defendant Rauer were payments by Hyman & Sons on account of a grading job done by the Sunset Construction Company previous to February 19, 1915, and this from the fact that bill No. 2239 sent by the Sunset Construction Company to O. Hyman & Sons was for the amount of \$1000.00, and that this bill, introduced by plaintiff, was not receipted.

Filmore Buckman, secretary of the Sunset Construction Company, testified relative to the collections on this grading job from Hyman & Sons and others (p. 401 of the testimony) that this grading was commenced on April 28, 1914, and finished on January 22, 1915, and that Mr. Rauer had nothing to do with any part of it and the Company had never assigned any part of it for collection, except the City's portion, which had been assigned to Mr. Rauer, and as to this, he says—"When the city portion was due, of course, that ran into 1915, but the bills were assigned to Mr. Rauer and collected by us; that is, the 14th Avenue bill."

On page 402 it appears from the testimony of the same witness that the paving job of the same portion of the street was immediately afterwards, March 26, 1915, let to Mr. Rauer who completed that job himself, hiring the Federal Construction Company to do it, and that Mr. Rauer sublet all the remainder [124] of the work that they had not done, which included the paving and some grading

of the street, and Mr. Rauer collected that for himself. This job was finished April 26, 1915, and accepted May 10, 1915. It also appears from the testimony, as well as from the Master's report, that the parties for whom the grading was done by the Sunset Construction Company and the parties for whom the paving was done by Mr. Rauer were practically the same parties, from which it would follow that the mere fact that the names of those who paid Mr. Rauer for paving correspond with the names of those who owed the Sunset Construction Company for grading does not prove that Mr. Rauer collected the Sunset Construction Company's grading bills, but simply shows that he collected his own bills.

Hyman's testimony shows (p. 456) that the payments made by him in May and June 1915 were on a different contract from those made to the Sunset Construction Company for grading; and it appears from the ledger account of Hyman, introduced in evidence by the plaintiff, that the grading job done by the Sunset Construction Company was for grading lots, and that the paving and curbing job, which is the other contract Hyman refers to, was for paving the streets and the little incidental grading connected therewith, upon a contract, the permit for which was issued to one Moran in May 1915, and by Moran assigned to Rauer.

Referring to the ledger sheets of Hyman, Oscar Hyman testified (pp. 463 and 484) as follows:

“Q. Now on this sheet marked ‘Street Work’ will you notice an item May 21 and another item May 24, to J. J. Rauer.

A. Yes.

Q. One item \$750 and the other \$250. Now these items were paid to Mr. Rauer?

A. Yes.

Q. On those dates?

A. Yes; that is our check register.

Q. They have no reference to this grading work, have they? A. No.

Q. That was for some other work?

A. We entered into a [125] contract for paving and sewerage and curbing of 14th Avenue; that is represented here in this.

Q. That would be this separate sheet here?

A. Yes.

Q. So that you would change your testimony of this morning in that respect? A. Yes.

The MASTER.—This separate sheet here means nothing in the record.

Mr. ANTHONY.—I am referring here by 'this separate sheet' to the sheet taken from the ledger account of Mr. Hyman pertaining to Outside Land Block 297 and marked 'Street Work Account,' and there is a reference on this in writing, Moran and Sunset Construction Company. A. Yes.

Q. That would refer to a separate contract, would it?

A. Moran had the original contract for that work."

During Defendant Rauer's testimony, the Master stated as follows:

"The MASTER.—But this does not prove that. This proved that on May 21, 1915, he re-

received \$750.00 from Heyman and on the 24th he received \$250.00. But does this prove that it was paving? It does not say so.

Mr. ANTHONY.—That is, Mr. Rauer identifies that as a portion of 14th Avenue job that he had something to do with, and pertains exclusively to paving.

Mr. WILLIAMS.—It corresponds also to the items that were put in the list of Mr. Heyman, wherein he puts in May 21, \$750, and there was another item of May 24, \$250.

The MASTER.—Yes, but I do not see that it goes beyond that. It amounts to nothing more than saying, that these items were not grading, they were paving. What does this prove?"

It should be borne in mind in this connection that this hearing was in March 1920; that there were no records introduced or extant absolutely identifying the character of these payments made to Mr. Rauer five years before, and that the burden of proof was on the plaintiff, the Trustee for Buckman; and it would seem in all reason that the only presumption that can be indulged from the fact that the payment of this \$750.00 and \$250.00 were made to Mr. Rauer is, particularly so since Mr. Rauer himself had a contract with these people, that it was in payment for Mr. Rauer's bill for paving and not in payment of the Sunset Construction [126] Company's bill for grading; and Mr. Rauer testifies that this is the fact.

The items in the contract to Moran, assigned to Mr. Rauer, for the paving and curbing were as follows:

288 feet curbing at \$1.35 per foot.....	388.80
5760 sq. ft. paving at 26¢ per foot.....	1497.60
Inspection fees.....	28.80

\$1915.20

To this should be added the Baker bill
 which Heyman also paid of..... 210.00

Making a total of Hyman's bill for paving
 and curbing of.....\$2125.20
 Graham received thereon an order for.... 1179.53

Leaving for Mr. Rauer's paving only....\$1045.67

And it is only shown that Mr. Rauer received the two Heyman checks for \$750.00 and \$250.00, or a total of \$1,000.00, showing that he did not even receive the full amount owing him from Heyman.

The Sunset Construction Company's books show that its bill for the grading against Heyman and Baker was only.....\$1409.00
 These books also show collections by the Sunset Construction Company on this account as follows:

Jan. 11, 1915.....	\$300	folio	320
" 22, "	200	"	322
Feb. 6, "	285	"	338
Baker.....	165		

\$950	950.00
-------	--------

\$459.00

If this \$1,000.00 be credited to Sunset Construction Co. grading, it would be overpaid \$541.00, even according to these book entries.

It should be remembered that in this particular transaction Filmore Buckman, who was the Sunset Construction Company's bookkeeper, also sent out the bills and made some of the collections [127] for Mr. Rauer on his paving contract, making out all these bills on the Sunset Construction Company's stationery and then, after having sent the bills in the name of the Sunset Construction Company to the property owners, giving an order in the name of the Sunset on the property owners to Graham for the curbing and to Rauer for the paving,—the Sunset Construction Co. not having done a bit of the work or contributed a cent to it.

In this connection are also concerned the following items:

May 25, Check of Dufau.....	\$ 20.00	..
" " " " H. Meyer.....	649.00	

These the Master found were all payments on the 14th Avenue grading job and that these payments were received by defendant Rauer. Filmore Buckman, who was the bookkeeper for the Sunset Construction Co. was sending out bills for Mr. Rauer's paving and curbing contracts at the same time and to the same persons that he was sending out bills for the Sunset Construction Co.'s grading job, and was more or less attending to the collections for both parties, as he was collecting from practically the same persons. And the accounts of both the Sunset Construction Co. and Mr. Rauer show that from some of the parties he credited payments to the Sunset Construction Co. for more than the grading bill, and to offset this he gave Mr. Rauer orders to collect grading bills. The following is Mr. Rauer's

account of the collections upon this curbing and paving job, which shows that, taking into account the \$819.52 owing from H. Meyer on the grading job collected by him, Mr. Rauer is still a loser on the 14th Avenue collections of \$40.20 (and he should not be charged with the check of May 25, H. Meyer \$649.00), viz.: [128]

	Charge for Curbing and Paving	Amt. Rec'd by Mr. Rauer or others	Balance Collected and re- tained by Sunset	Excess over- payment bills col- lected by Rauer
Webb	166.25	\$137.50	28.75	
Ryder	319.20	306.70	12.50	
Reva	322.21	322.21		
Babbitt	366.51	366.51		
Maloney	319.20	250.00	69.20	
Katz	207.80	167.50	40.30	
Jordan	157.50	83.65	73.85	
Lathrop	198.75	145.00	53.75	
Gardius	215.93	160.00	55.93	
Salari	198.75	148.81	49.94	
Gets & Sons	1,043.36	1,043.36		
M. Baker	210.00)	(1,179.00		Graham
Hyman	1,969.00)	(1,000.00		Rauer
Dufour	40.00	40.00		

	Charge for Curbing and Paving	Amt. Rec'd by Mr. Rauer or others	Balance Collected and re- tained by Sunset	Excess over- payment bills col- lected by Rauer
Henry Meyer)				
S. Meyer)	2,328.52	\$3,148.04		819.52
C. R. Russell	196.00	195.00	1.00	
Tarpey	336.00	30.25	305.75	
Corking	198.75	30.00	168.75	
	<hr/>	<hr/>	<hr/>	<hr/>
	8,793.73	8,753.53	859.72	
	7,753.53		819.52	
	<hr/>		<hr/>	
Loss to Mr. Rauer	40.20		40.20	

As to the item of May 25th Check of Ryder for \$245.00, the Master finds as follows:

“As regards these matters Ryder in fact paid Rauer \$306.70, of which \$245.00 was the proceeds of a note given by him to the company and turned over to Rauer on February 24, 1915.”

The evidence relating to this matter shows that Ryder did give a note for \$250.00 to the Sunset Construction Co. about this same time; and the Sunset Construction Co.'s small cash book, page 14, shows the following transactions (that the Sunset Construction Company received the proceeds of that note to the amount of \$245 directly from Mr. Rauer, viz.:

“February 24, 1915, Received from J. J.

Rauer check..... \$245.00

Discount on note... 5.00

\$250.00

Assigned to J. J. Rauer note Ryder on 14th

Ave..... \$250.00”

[129]

Defendant Rauer's check-stub No. 1631 in evidence shows that this was Mr. Rauer's own check dated February 27, 1915, to Sunset Construction Company and was paid to the Sunset Construction Co. on that date. In other words, the Sunset Construction Co. on that date received from Mr. Rauer the full value of that note. In other words, Mr. Rauer paid to the Sunset Construction Co. Ryder's note and the Sunset Construction Co. received therefor \$245.00 on February 24, 1915, just the same as if Ryder himself had paid it to the Company; and

yet the Master wants to make Mr. Rauer account to Buckman's Trustee for the subsequent payment of the note by Ryder to Rauer.

As to the Academy of Sciences' \$300.00 payment to Mr. Rauer, the evidence of Filmore Buckman shows (pp. 389, 390) that this job started on July 1, 1915, and ended on July 21, 1915. (Buckman's bankruptcy was February 19, 1915.)

"A. The Sunset Construction Company had a contract with the Academy of Sciences for doing certain work around the Museum out there, and that was completed with the exception of certain back-filling that was to be done after the building was completed. When the time came to complete the contract it cost a great deal more to complete it than the balance retained by the Academy of Sciences. Later on we had to go back and do that work. Then there was a balance, I believe it was \$300 odd, due the Sunset Construction Company on the contract. I think it cost between \$500 and \$600 to complete the work."

And Mr. Rauer's account shows the moneys that Mr. Rauer then presently had expended for this work and for which he got in return only this \$300, to be the following:

Pay-roll	\$298.60
Stock hire	252.00
	<hr/>
	550.60
Amount received	300.00
	<hr/>
Loss to Mr. Rauer	\$250.60

Because Mr. Rauer was paid this \$300 which never would have been [130] paid unless Mr. Rauer advanced the money for the pay-roll and stock hire and finished the job, the Master wants to charge this \$300 against Mr. Rauer in favor of the Trustee of Buckman and not allow Mr. Rauer his credits of \$550.60 against the same, because it happened to be an uncompleted contract from before February 19, 1915.

The item: "Reeder & Foster, \$407.20" is charged against defendant Rauer by the Master on the theory that this payment was for work done by the Sunset Construction Co. previous to February 19, 1915; and in the face of this theory the Master makes this finding with reference to this particular check (report, pp. 47, 48):

"Cash book #2, page 30, shows that on July 6th, the Sunset Construction Company received from Foster & Vogt (which seems to have been another name for Reeder & Foster) *in full for June team hire*, the sum of \$907.20. Page 31 shows that on July 3 there was given to D. F. Cramer an order on Foster and Vogt for \$500 and on July 6th, to J. J. Rauer a like order for \$407.20. This was the bookkeeper's crude method of indicating that Foster & Vogt had paid their bill by signing two orders in the total sum of the amount of the bill. Rauer's statement of account acknowledges the payment."

On the cash-book of the Sunset Construction Company (pages 30 and 31 entries *for July, 1915*) the item appears as follows:

Foster & Vogt (which was another
 name for Reeder & Foster) in full
 for *June team hire*.....\$907.20
 Paid as follows:
 Stock hire, D. F. Cramer.\$500.00
 Foster & Vogt..... 407.20 907.20

Defendant Rauer calls particular attention to the Master's finding that this was "*in full for June team hire*," and not for any work done prior to February 19, 1915, and, therefore, even on the theory adopted by the Master, it cannot be charged against defendant Rauer in favor of Buckman's trustee. [131]

EXCEPTION V.

Defendant Rauer excepts to the findings of the Master that he must pay Buckman's trustee \$9,-016.99 for the rental and use after Feb. 19, 1915, of the equipment and personal property of the Sunset Construction Company, mortgaged to defendant Rauer, and which the Master stated to consist of the following items (Report pages 48 and 24), viz.:

"January 1916 Rental of
 equipment on T. Street
 job \$1,312.50
 Less repairs 148.43

\$1,164.07

Miscellaneous collection of
 rentals (Report page 24)
 consisting of the follow-
 ing:

Hutton, included in statement of account, under date August, 1916..... 927.00

Items not included in account but shown in statement of account rendered Buckman:

Sept. 10, 1916	\$200
Oct. 14, "	400
Nov. 10, "	400
Dec. 9, "	300

1,300.00

Rent from Morgan Improvement Co. 159.13

Scrap iron sold 75.00

2,461.13

1/2 Federal Construction Co.

payment 5,381.79

9,006.99

In Exhibit I, hereto attached, defendant Rauer has set forth the following: the jobs on which any of this equipment was employed by defendant Rauer, the time during which it was employed on these various jobs, and the actual part of the equipment that was so employed, and the rental or the value of the use thereof as estimated by plaintiff's own expert witness Simmie, and giving the items thereof in full, which he here recapitulates as follows: [132]

T. St. job April 11, 1916 to July 24, 1916	\$1,088.50
Hutton job, May 10, 1916 to Aug. 14, 1916	681.30
Hutton and Cramer job, Aug. 24, 1916, to Dec. 9, 1916,	794.85
Morgan Imp. Co. job Aug. 24, 1916 to Nov. 16, 1916	102.00
Federal Construction Co. jobs San Bruno and 21st Ave. and B. Sts., April 11, 1915 to July 31, 1915, and July 30, 1915 to Oct. 30, 1915	1,050.00
	<hr/>
	\$3,716.65

From the foregoing it appears that defendant Rauer was using this equipment between April 4, 1915 and October 30, 1915, and between April 11, 1916 and December 9, 1916; and for those periods the Master holds he must account to Buckman's trustee.

Mr. Rauer rendered and introduced his accounts for betterments and repairs covering the period from April 4, 1915 to December 9, 1916, and we attach to these exceptions, marked "Exhibit 2" a copy of this account for repairs and betterments, in which the period of 5½ months between October 30, 1915, and April 11, 1916, during which the equipment was not employed is shown in a separate column.

From common experience, every one that deals with machinery knows that a great deal of repairing is done during the periods of the machinery's unemployment, and it will be noticed that the period

of 5½ months during which this employment did exist was just between the two periods, during which this equipment was very actively employed, and it was therefore receiving the benefits of the repairs and improvements made during this time of unemployment.

From this account for repairs and betterments, it appears that during the period of actual employment, Mr. Rauer expended therefor sums aggregating	\$1,648.22
and during the 5½ months between the times of actual employment	377.74
	<hr/>
a total of	\$2,025.96

[133]

Brought forward	\$2,025.96
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To this should also be added the cost paid by Mr. Rauer for the installation of electricity to the P. G. & E. Co. on the T. St. job, where he deposited . . . \$499.40 and received a refund of 281.00

or the difference of	218.40
	<hr/>
	\$2,244.36

It is also in evidence that Mr. Rauer paid during all this time from Feb. 15, 1915, to December, 1916 (22 months) a rental of \$25.00 per month for the block at O. & 20th Sts., where the equipment and all the auxiliaries were stored, and to which it was returned and from which it

was moved to these jobs, and without the facilities of which it could not have been properly employed—the total of this rental was 22 months at \$25.00 per month or 550.00

This makes a total for betterment, repairs and installment and yard rental paid out by Mr. Rauer of \$2,794.36

It is shown in Exhibit 1 hereto attached just what equipment was employed on each particular job, and time thereof, and the actual rental values thereof according to plaintiff's expert Simmie, and the total of those rental values is 3,677.90

The total expenses for repairs, betterments, installation, and yard rent is 2,794.36

Leaving the net rental of the equipment used\$ 883.66

This does not include or take into consideration the \$100.00 per month paid by Mr. Rauer to A. E. Ball (royalty on sand machine patent) for 16 months from April 1915 to Aug. 1916 (which was among the money advanced during that period by Mr. Rauer to the Sunset Construction Co., and concerning which the Master would not listen to an accounting); nor does it take into consideration the same sum due Mr. Rauer for that

royalty for the four months from August, 1916, when he purchased this patent right, to December, 1916, the end of the operations.

But assuming that the question was not, what was the actual value of the rentals for which Mr. Rauer was supposed to account, but that Mr. Rauer was to account for the results of all his contracts for which the equipment formed the basis, then there should still be deducted from the amount as charged against Mr. Rauer by the Master of the following, viz.: \$9,016.99
[134]

Brought forward	\$9,016.99
Repairs, betterments, instal-	
lation and rent of yard.	\$2,794.36
Royalty on sand machine patent	
@ \$100 per month for 22 months	2,200.00
	<hr/>
	\$4,994.36

And since the Master, in arriving at the sum of \$9,016.99 has taken the position that Mr. Rauer was accountable (not for the actual rentals), but for the profits on his contracts and his actual collections, then Mr. Rauer should also be allowed to deduct his losses; and on the "T" St. contract he lost \$945.00

And the Master instead
has charged against him
in the \$9,016.99 a rental
for the "T" St. job of .. 1,164.07

Or a total further de-
duction on account of the
"T" St. job of.....\$2,109.07

\$2,109.07

\$7,103.43

There should also be deducted
therefrom the amount derived
from the scrap iron sale, which, as
we have seen, consisted of the
parts replaced and paid for by Mr.
Rauer, and was certainly part of
the property mortgaged to Mr.
Rauer and the proceeds of which
he certainly was entitled to have
applied upon his indebtedness;
and this scrap iron was sold for 75.00

\$7,178.43

which makes a total of deductions
to be made of 7,178.43

Leaving, even adopting the theory
of the Master, only a net rental of \$1,838.56

The equipment belonging to the Sunset Construc-
tion Company (and which consisted of all the Com-
pany's physical property) was mortgaged to de-
fendant Rauer on June 16, 1914, to secure two

promissory notes aggregating \$15,000.00, and also to secure the other indebtedness owing or which might become owing to defendant Rauer from the Sunset Construction Company. The validity of this mortgage is not questioned. [135] The moneys owing on said promissory notes, together with other moneys aggregating a large sum, were due and unpaid on February 19, 1915, and default had been made in the payment almost immediately after the execution of the notes and mortgage, and under the terms of the mortgage defendant Rauer had a right to take possession of the property upon default. The taking of possession by defendant Rauer of this equipment was not adverse, but was in entire conformity with this very provision of the mortgage contract entered into between him and the corporation, and when he did take possession it was with the consent of the corporation and with the understanding that he should be entitled to apply upon his indebtedness all rentals or values received for the use thereof. Immediately after February 19, 1915, and when defendant Rauer took possession of the equipment, he found the three sand machines in such a condition that they were useless, and he reconstructed them, paying therefor between \$400 and \$500 each, and the total repairs on said equipment aggregated \$2025.96. (See testimony p. 475, and defendant Rauer's bill of expenses—Exhibit 2 hereto attached.)

Defendant Rauer also introduced his file of bills for these repairs but because these bills (Except \$148.43 of them) were not receipted, the Master

allowed only the \$148.43 and has disallowed the remainder of said \$2025.96, although they were accompanied by the statement of defendant Rauer of the amounts expended by him therefor, and although defendant Rauer testified that he had paid them.

All this equipment, including the sand machines, and which was Mr. Rauer's sole security for his advances, was sold in this proceeding on December 7, 1916, for the sum of \$3701.60, which was 90% of the value thereof fixed by appraisers appointed in this proceeding; and for the use of this equipment for [136] the period of fifteen months, the Master charges defendant Rauer with the sum of \$9,006.99, which is more than twice its value; and these sand machines, tracks, cars and general excavating machinery were used for a period of fifteen months in the roughest kind of work requiring constant and expensive repairs and replacements, and which repairs and replacements Mr. Rauer's accounts shows cost him \$2025.96; and the Master charges him with \$9006.99 rentals and allows him repairs and replacements during that period the stupendous sum of \$148.43. The flagrant injustice of this appears from the very nature of things, and this was all mortgaged property, mortgaged to defendant Rauer way back in June, 1914, for the debt the Sunset Construction Company owed him, and which debt even according to the Master's finding amounted on February 19, 1915, to \$18,746.22. After February 19, 1915, defendant Rauer used this mortgaged property, and rebuilt and repaired

it, and collected the value of the use and rental of that property and applied every cent upon this mortgage debt. His possession of the property during this period was without the slightest objection from the Sunset Construction Company or even the plaintiff in this case, and the Sunset Construction Company received the full benefit thereof by having it credited on its debt. Under the laws of the State of California the only difference between a chattel mortgage and a pledge is that in the chattel mortgage the mortgagor may retain possession. When that possession goes to the mortgagee that difference ceases. It then had all the elements of a pledge in Rauer's hands. He used it, collected the rentals and applied the results upon the indebtedness the corporation owed him, and under the law (Cal. Civil Code, Sec. 2989), not only the physical property, but its increase, and its rentals, belong to the pledgee for the purpose of application by him upon the indebtedness secured thereby; and defendant Rauer had a right to take such possession under the [137] very terms of the mortgage, and to rebuild the sand machines and the rest of the equipment so that it would earn something and reduce the Sunset Construction Company's indebtedness to him.

During the same time that these various jobs were going on Mr. Rauer was advancing all necessary funds to the Sunset Construction Co. for its various operations; and, as shown by his statements, the balance the Sunset Construction Co. still owes him upon these advances since February

19, 1915, is the sum of \$18,561.54, besides the balance owing him, on Feb. 19, 1915, and which even the Master found to be \$18,746.22.

And defendant Rauer excepts to the Master holding that he cannot apply the value of the use of the property mortgaged to him upon the actual expenses he was to in rehabilitating, repairing and maintaining that property and also upon the current advances he made to the Sunset Construction Co., nor upon the debts that they owed.

This contract with the Federal Construction Co., as the result of which the Master seeks to charge defendant Rauer with \$5,381.79 (one-half the gross profits thereof) was a verbal contract entered into between the Federal Construction Co. and the Sunset Construction Company about January, 1915, and according to which the Federal Construction Co. was to furnish the money and the Sunset Construction Co. was to furnish the services of A. E. Buckman as construction engineer and the equipment, and nothing whatever was done on this contract until April 11, 1915 (the bankruptcy of A. E. Buckman was on Feb. 19, 1915).

This was a contract requiring for its fulfillment the personal services of A. E. Buckman, and even if we proceed upon [138] the construction placed upon this case by the Master that the bankruptcy of Buckman was the bankruptcy of the Sunset Construction Company, still this is a contract requiring the personal services of the bankrupt, entirely unperformed at the time of the bankruptcy, and subsequently performed by the rendition of

this personal service; and therefore under no construction did it pass to the bankrupt's trustee.

As we have seen (p. 21 of these exceptions and Ex. 1, p. d.) the gross rental value of the equipment employed on these Federal Construction Co. jobs, at the high estimate placed thereon by plaintiff's expert, only amounted to \$1050.00; while besides the rendition of the personal services by A. E. Buckman upon these jobs, defendant Rauer furnished his own personal services, and also the equipment necessary, and the teams required and money therefor; and defendant Rauer gave full credit for his receipts therefrom upon his current advances to the Sunset Construction Co. and the moneys so owing by it to him. [139]

EXCEPTION VI.

Exception is taken to the report of the Master because the report proceeds upon an erroneous construction of the decree under which the reference was made.

The Master has construed the decree as being an adjudication by the court that no recognition can be given to the corporation, Sunset Construction Co.; that such corporation must be viewed as nonexistent—simply as Buckman masquerading under the name of Sunset Construction Company, and that such masquerading was for the purpose of defrauding the creditors of Buckman, and that Rauer must be considered as a participant in the fraud and as conspiring with Buckman in the purpose of defrauding Buckman's creditors.

In other words, the construction placed on the decree by the Master is to the effect that this litigation did not proceed to determine the ownership of the shares of stock referred to in the complaint; that the shares of stock in law had no existence, and that it was not sought by this litigation, or by the decree, to give the trustee in bankruptcy any rights attached to the ownership of the shares, but that the purpose of the litigation was to have it declared that there were no shares of stock in legal effect; *that there was no corporation, Sunset Construction Company*, and that an accounting must be had between defendant Rauer and the trustee in bankruptcy just as if Buckman, the bankrupt, and not the corporation had transacted business with Mr. Rauer; that no attention or consideration should be given to the allegations of the complaint, wherein it is alleged that the Sunset Construction Company is a corporation, and that Buckman was the owner of the shares of the stock of the corporation, that the transfer by Buckman of these shares to Rauer was in fraud of creditors, or that the transfer of these shares should be [140] set aside, or to the allegation that it should be adjudged that the shares belonged to the trustee in bankruptcy so that from the proceeds of those shares, the trustee might have assets to pay the creditors.

The construction which the defendant Rauer contends should be placed upon the decree is that the action in which the decree was rendered was brought to have it declared that the trustee in

bankruptcy was the owner of all the shares of stock in the Sunset Construction Co., a corporation, on the ground that the shares had been issued to A. E. Buckman, except the qualifying shares to the other directors; that the transfer by Buckman to Rauer was not effective, and that the transfer of said shares was void, and that hence, as the shares belonging to Buckman were practically all the shares of the corporation, and passed to the trustee in bankruptcy, that he, the trustee in bankruptcy, as the owner of said shares of stock of the corporation, was entitled to an accounting of all transactions between Rauer and the corporation.

It is the contention of defendant Rauer that the complaint and the decree recognize the existence of the corporation, and that the decree determines that defendant Rauer, as an individual, shall account to the corporation, the Sunset Construction Co., of all transactions between him on the one side and the corporation on the other from the said 12th day of December, 1911, down to the time of the making of the decree, Sept. 11, 1916.

Defendant Rauer contends that the construction placed upon the decree by the Master cannot be reconciled with the theory upon which the complaint was filed, and that the evidence in the case shows that the trial did not proceed, nor was there any issue raised bearing out the construction placed upon the decree by the [141] Master; that the pleadings in the case show that the issues were as to whether Buckman had fraudulently transferred the shares of stock, and as to whether the

fraudulent transfer should not be set aside, and that shares of stock be decreed to belong to the trustee in bankruptcy; and that the evidence has shown that this defendant has at all times and in every one of his transactions dealt with said corporation in the full belief that he was dealing with a corporation, which the complaint herein alleges the Sunset Construction Co. at all times was; and even if said corporation had only been a *de facto* corporation the dealings of third parties with it could not be affected by a stockholder's bankruptcy.

EXCEPTION VII.

This defendant further excepts to the report of the Master and prays that it be set aside and considered null and void for the following reasons:

That this action is prosecuted by a trustee in bankruptcy; that it was known to the Master before he filed his report herein that there were no assets of any kind or nature belonging to the estate represented by the plaintiff, as trustee, except the claim involved in this litigation; that the Master has filed a petition in this court in this case requesting that he be allowed the sum of \$5,000.00 for services rendered by him in receiving the evidence and making his report; and in his petition he alleges that time amounting to 12 days was consumed in hearing the evidence and 30 days was required by him to make his report, amounting to 42 days, for which he asks the said sum of \$5,000.00, and the Master requests in his said petition that this \$5,000.00 be ordered paid

by the defendant Rauer within ten days from the date of the order, and that the \$5,000.00 so to be ordered paid by the defendant Rauer be in addition to the amount of the judgment reported against [142] Rauer by the Master; and this because of the facts set forth in the Master's petition that Rauer is found by the report to be indebted to the plaintiff, and that there are no funds in the possession of the trustee, other than such as might result from an approval of said report; and that unless a judgment were found against defendant Rauer there could be no basis for the Master's request for a \$5,000.00 compensation, or its imposition against defendant Rauer.

While defendant Rauer disavows the thought that the Master in making his report was consciously affected by the foregoing considerations, yet it is a fact that the said conditions existing, the Master's claim for \$5,000.00 compensation would be affected by his judgment, and therefore the report should not be considered.

WHEREFORE this defendant prays that this Honorable Court do not adopt the Master's conclusions as set forth in his Report, but that it be decreed that the defendant Rauer owes nothing whatsoever to said corporation, Sunset Construction Co., and nothing whatsoever to plaintiff, trustee for A. E. Buckman, bankrupt.

Respectfully submitted,

H. M. ANTHONY,

GRANT & ZIMDARS,

Attorneys for Defendant J. J. Rauer. [143]

Exhibit 1.

The Master has charged that Mr. Rauer is liable to Buckman's trustee for the rentals and use since February 19, 1915, of the personal property mortgaged to Mr. Rauer by the Sunset Construction Company in the following amounts, viz.:

"January 1916 Rental of	
equipment on T. Street	
job '.....	\$1,312.50
Less repairs	148.43
<hr/>	
	\$1,164.07

Miscellaneous collection of rentals (Report page 24) consisting of the following:

Hutton, included in statement of account, under date August, 1916..... 927.00

Items not included in account but shown in statement of account rendered Buckman:

Sept. 10, 1916.....	\$200
Oct. 14, "	400
Nov. 10, "	400
Dec. 9, "	300

1,300.00

Rent from Morgan Im-	
provement Co.	159.13
Scrap iron sold.....	75.00
	<hr/>
	2,461.13
1/2 Federal Construction	
Co. payment.....	5,381.79
	<hr/>
	\$9,006.99

In the exceptions, this defendant has set forth the reasons why he should not be required to pay these sums to Buckman's trustee, and he herewith presents a statement showing the following, viz.:

The jobs on which any of this equipment was employed by defendant Rauer, the time during which it was employed on these various jobs, and the actual part of the equipment that was so employed, and the rental or the value of the use thereof as estimated by plaintiff's own expert witness Simmie (testimony pages 429, 430). [144]

As to the item,

"1916

Jan. Rental of equipment on T. St. job	
(testimony 485-489).....	\$1,312.50
Less repairs.....	148.43
	<hr/>
	\$1,164.07

This extended from Apr. 11, 1916, to July 24, 1916, 3½ months, and the equipment on this job and the rentals therefor, for said 3-1/2 months, as per plaintiff's expert Simmie would be as follows:

1200 ft. of track at 3¢ per month for 3-1/2 months.....	\$126.00
25 cars at \$5.00 per month for 3-1/2 months	437.50
1 sand machine at \$150.00 per month for 3-1/2 months.....	525.00
	<hr/>
	1,088.50

(As to this job, Mr. Rauer made a 50-50 agreement with the Sun-set Construction Co. on a profit and loss basis, and Mr. Rauer lost 945.00, none of which has been repaid, but instead the Master charges up as rentals against Mr. Rauer on this job, \$1,164.07.)

As to the item:

“Hutton, included in statement of account under date August 1916..... \$927.00
This lasted from May 10, 1916, to Aug. 14, 1916—
3 months.

The equipment on this job and the rentals therefor for the three months, as per plaintiff's expert Simmie, would be as follows:

570 ft. track at 3¢ per ft. per month for 3 months.....	\$51.30
12 Koppel cars at \$5 per car per month for three months.....	180.00
1 sand machine at \$150 per month for three months.....	450.00

\$681.30

(On this contract Mr. Rauer actually collected \$927.00, and this the Master charges to him, instead of the actual value of the rentals, although the Master refuses to allow Mr. Rauer for his loss of \$945.00 on the "T" St. contract.) [145]

As to the items:

"Not included in account, but shown in statement of account rendered Buckman," totalling.....\$1,300.00
Hutton & Cramer—

This lasted from Aug 24, 1916, to December 9, 1916—3-1/2 months.

The equipment on this job and the rentals therefor for the 3-1/2 months, as per plaintiff's expert Simmie, would be as follows:

570 ft. of track at 3¢ per month for	
3 months.....	\$59.85
12 kopple cars at \$5.00 per car per	
month for 3 1/2 months.....	210.00
1 sand car at \$150.00 per month	
for 3 1/2 months.....	525.00

794.85

(In this instance Mr. Rauer made an advantageous contract and collected \$1,300.00, all of which the Master charged against him, even though he refused to allow for his loss of \$945.00 on the T. St. contract, and permits him no set-offs for repairs or for his time.)

As to the item:

"Rent from Morgan Improvement Co..... 159.13"

This lasted from Aug. 24, 1916, to Nov. 13, 1916, 3 months.

The equipment on this job, and the rentals therefor, as per plaintiff's expert Simmie, would be as follows:

300 ft. of track at 3¢ per ft. per month for 3 months.....	27.00
5 koppel cars at \$5.00 per car per month for 3 months.....	75.00
	<hr/>
	\$102.00

(But the Master charges Mr. Rauer therefor with \$159.00, which is the total Rauer received, and permits him no set-offs for repairs or for his time.)
[146]

The next item: Scrap iron..... \$75.00
is charged against Mr. Rauer
by the Master. This indeed
is unique.

(This scrap iron consists of the broken parts replaced by Mr. Rauer upon the machinery which was mortgaged to him, and for which replacement he is not allowed, and still this scrap iron, which was part of the property actually mortgaged to him, and the proceeds of which to the extent of \$75.00 he applied upon his mortgage debt, he is charged with, and directed by the Master to pay to Buckman's trustee.)

As to the item:

"1/2 of Federal Construction Co. payment \$5,381.79"

This consists of the following two jobs:

San Bruno (testimony 485) from Apr. 11, 1915 to July 31, 1915, 3-2/3 months.

The equipment on this job, and the rentals therefor for the 3-2/3 months, as per plaintiff's expert, Simmie, would be as follows:

1,000 ft. of track at 3¢ per foot per	
month for 3-2/3 months.....	\$110.00
11 wooden cars at \$5.00 per car per	
month for 3-2/3 months.....	220.00
	<hr/>
	\$330.00

21st Ave. and B. St., July 30, 1915 to Oct. 30, 1915, 3 months—

1,000 ft. of track at 3¢ per ft. per	
month for 3 months.....	90.00
12 koppel cars at \$5 per car per	
month for 3 months.....	180.00
1 sand machine @ \$150 per month	
for three months.....	450.00
	<hr/>
	720.00

720.00

\$1,050.00

(This was an extremely profitable job, and the Master charges Mr Rauer with the full amount of the profits, which the Master holds as applicable to the equipment, and allows Mr. Rauer not a cent repairs or for anything else, and does not allow him his losses on the "T" St. job.) [147]

To recapitulate:

The total rental of the equipment so employed by Mr. Rauer for the period so employed, at the high rental value placed thereon by plaintiff's expert, Simmie, is the following:

T. St. job April 11, 1916 to July 24, 1916	\$1,088.50
Hutton job, May 10, 1916 to Aug. 14, 1916,	681.30
Hutton and Cramer job, Aug. 24, 1916, to Dec. 9, 1916.....	794.85
Morgan Imp. Co. job, Aug 24, 1916 to Nov. 16, 1916.....	102.00
Federal Construction Co. jobs, San Bruno and 21st Aves. and B. St., April 11, 1915 to July 31, 1915, and July 30, 1915 to Oct. 30, 1915.....	1,050.00
	<hr/>
	\$3,716.65

[148]

Exhibit 2.

(Testimony pp. 488-90; also bills; also objections to Master's tentative report pp. 31-32.)

Amounts paid by Defendant J. J. Rauer for repairs and betterments of equipment:

1915		Voucher Number	Amount
April 15,	Enterprise El. Co.....	651	\$100.00
May 16,	Enterprise El. Co.....	650	85.00
June 5,	Meese & Gottfried Co.....	341	39.80
" 22,	Enterprise El. Co.....	15	100.00
" 22,	Messe & Gottfried Co.....	346	29.29
" 22,	Meese & Gottfried Co.....	165	12.45
" 26,	Iron, etc. Waterhouse & L.....	718	73.10
July 14,	Meese & Gottfried Co.....	170	29.29
" 23,	Waterhouse & Lester Co.....	178	78.27
" 23,	Meese & Gottfried Co.....	172	24.10
" 28,	Meese & Gottfried Co.....	359	2.20
" 31,	Pacific Steel & Hdwe. Co.....	167	29.70

		Voucher Number	Amount
1915			
July	31,	Meese & Gottfried Co.....	360 \$ 24.45
"	31,	Meese & Gottfried Co.....	360 3.65
"	31,	Hall Electric Co.....	202 20.00
Aug.	2,	Scott Wagner & Co.....	199 103.64
"	5,	Meese & Gottfried Co.....	196 15.65
"	6,	Steel & Supply Co.....	192 8.30
"	6,	Meese & Gottfried Co.....	191 29.05
"	6,	Meese & Gottfried Co.—Cash.....	1.80
"	11,	Belting, Degen.....	661 1.00
"	11,	Western Scraper Co.....	400 34.00
"	21,	Waterhouse & Lester.....	209 147.29
"	21,	Hall Electric Co.....	207 20.00
"	26,	Hall Electric Co.....	206 12.40
Sept.	4,	Meese & Gottfried Co.....	226 16.00
"	16,	Meese & Gottfried Co.....	217 2.85
"	16,	Waterhouse & Lester.....	218 6.30
Oct.	4,	Meese & Gottfried Co.....	238 8.08

		Voucher Number	Amount
1915			
Oct.	14, Meese & Gottfried Co.....	230	\$ 1.25
"	16, Hall Electric Co.....	235	5.60
"	28, Waterhouse & Lester.....	236	48.77
			<hr/>
			1,113.28
Nov.	16, Waterhouse & Lester.....	254	7.55
Dec.	1, Ajax Fdy. Co.....	258	15.70
"	Waterhouse & Lester.....	377	5.70
"	15, Enterprise El. Co.....	272	80.00
"	28, Dolan Wrecking Co.....	270	20.50
"	30, Meese & Gottfried Co.....	261	8.00
1916			
Jan.	3, Enterprise El. Co.....	14	3.25
"	8, Western Pipe Co.—Bal. due.....	381	1.16
"	24, Waterhouse & Lester.....	265	8.30
"	28, Costs " " .....		.80
Feb.	4, Ajax Fdy. Co.....	7	12.60

1916		Voucher Number	Amount	
Feb.	4,	Enterprise Elec. aa & L.....	275	\$ 1.90
"	21,	Meese & Gottfried Co.....	282	7.08
Mar.	6,	Enterprise El. Co.....	286	4.60
"	6,	Ajax Fdy. Co.....	283	25.20
"	6,	Meese & Gottfried Co.....	287	27.12
"	14,	Waterhouse & Lester.....	284	34.60
				<hr/>
				\$264.06
Forward,				264.06
Mar.	30,	Meese & Gottfried Co.....	298	26.50
Apr.	5,	Waterhouse & Lester.....	296	19.18
"	9,	" "	310	68.00
May	3,	" "	312	17.82
"	3,	" "	311	7.00
"	2,	Ajax Fdy. Co.....	5	4.00
"	2,	Enterprise Elec. Co.....	319	9.10

		Voucher Number	Amount
1916			
Sept.	15,	Meese & Gottfried Co.....	\$ 2.48
"	30,	" " ".....	30.22
Oct.	18,	" " ".....	13.79
Aug.	16,	Ajax Fdy. Co.....	100.00
			<hr/>
			377.74
			<hr/>
			1,648.22
			<hr/>
			377.74
			<hr/>
			\$2,025.96

Received a copy of the within objections this 25th day of January, 1922.

E. H. WILLIAMS,

CHARLES S. WHEELER, Jr.

[Endorsed]: Filed Jan. 26, 1922. W. B. Mal-
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.
[150]

(Title of Court and Cause.)

**Objection to Special Master's Petition for Com-
pensation.**

To the Honorable Judge of the United States Dis-
trict Court:

Comes now the defendant J. J. Rauer and files the following objections to the petition of the Special Master for compensation, and which petition was filed herein, and a copy served upon this defendant January 10, 1922, viz.:

The Master states that he has spent 12 days in taking testimony and 30 days in giving consideration thereto and making his report, or a total of 42 days, and he asks therefor compensation in the sum of Five Thousand (\$5,000) and he asks that his compensation be charged against defendant J. J. Rauer.

Defendant J. J. Rauer objects both to the extent of said compensation, and to the same, or any part thereof, being charged against him, and in that respect represents as follows:

That it appears from this defendant's objections to the Master's report herein referred to, and

from said report and the testimony in said matter, and from the order of reference herein, that this defendant was dealing solely and alone with the Sunset Construction Company, which was, at all the times that this defendant was dealing with it, a duly incorporated and organized and existing and functioning corporation, of which the bankrupt A. E. Buckman owned all the stock, except the qualifying stock to the other directors.

That said corporation has never been declared a bankrupt, and no bankruptcy proceedings have ever been initiated against it.

That said corporation owed to this defendant at the time of the bankruptcy of said A. E. Buckman, large sums of money, stated by him to be in excess of Thirty-six Thousand Dollars (\$36,000), which even the Master finds were at said time [151] in excess of Eighteen Thousand Dollars (\$18,000); and that in this defendant's subsequent dealings with said Sunset Construction Company said corporation became indebted to him to the extent of over Eighteen Thousand Dollars (\$18,000) more, and is so indebted to him at the present time in excess of the sum of Thirty-six Thousand Dollars (\$36,000).

That the Master refused to take into account this defendant's account with said corporation, except up to the date of said Buckman's adjudication as a bankrupt, and took the position that since said Buckman was the owner of practically all of the capital stock of said corporation, that therefore the application by this defendant of his subsequent

receipts from the corporation upon this defendant's debts, should not be permitted, but that the corporation's money, which it had so permitted him to apply upon the corporation's debt to him, should be paid over by this defendant to the trustee in insolvency of A. E. Buckman, and these receipts the Master states amounted to the sum of Thirteen Thousand Twenty-three and 19/100 Dollars (\$13,023.19).

This defendant further represents that according to the evidence, and even according to the Master's report, this defendant's dealings with said corporation were in the full belief that he had the right to deal with said corporation as a separate entity unaffected by the insolvency proceedings against A. E. Buckman personally, and that his dealings with said corporation were fair and above board, and that he paid value to this corporation for everything that he received from it, and, in fact, said corporation is at the present time indebted to him in excess of \$36,000, even after the application of all he received from said corporation.

This defendant further represents that the Master's statement that the amount involved in this litigation was \$70,000 [152] is misleading. That it is true the trustee in bankruptcy made the claim that there was approximately \$32,000 owing by this defendant to the trustee of Buckman on account of this defendant's dealings with said corporation, but that the evidence shows that there is not a single cent owing from this defendant to said trustee, and that this even appears from the

facts found by the Master; and that the evidence further shows that a serious injustice would be inflicted upon this defendant were the Master's conclusions and his petition herein given effect.

This defendant further represents that none of the creditors who have filed their claims in the above proceedings were creditors of, or in any manner connected with the transactions of the Sunset Construction Company; and that no notice was ever given to creditors of the Sunset Construction Company to file their claims herein, and that creditors of the Sunset Construction Company were never considered in these proceedings as creditors of Buckman; and that this defendant is a creditor of the Sunset Construction Company to the extent of over \$36,000, even after applying upon the indebtedness all the moneys received from the Sunset Construction Company, and that even according to the Master's report the total assets of the Sunset Construction Company were only \$13,023.19, and that \$9016.99 of this consists of rentals charged by the Master against defendant Rauer, and which arise out of this defendant's use of the very property that was mortgaged to him as security for his \$36,000 balance, and which personal property only sold for \$3701.22 and which \$3701.22 although belonging to this defendant, is impounded in this court in this action, and that this matter never involved \$70,000, but at most \$13,023.19.

And this defendant further represents that the claim here made by the Master for \$5000 compensation for 42 days' service is out of all proportion

and reason; and that the highest paid [153] Judges of the Superior Court in the State of California only receive a salary of \$6000 a year, for which they give at least 300 days' service in the year, or at the rate of \$20 per day, which for 42 days would only be \$840, and that the great majority of the Superior Court Judges of the State only receive \$4000 per year, or at the rate of \$13.1/3 per day, which for 42 days would be only \$560; that the Judges of the Supreme Court of the State of California only receive a salary of \$8000 a year, for which they give at least 300 days' services a year, or at the rate of \$26.2/3 per day which for 42 days would be only \$1120.

That previous to the filing of the Master's petition herein asking for \$5000 compensation and for its charge against and immediate collection from this defendant, this defendant and his counsel were astounded at the Master's repeated reiteration of the great difficulties encountered by him in the making of his report and at his conclusions therein.

That the Master has entirely misconceived the meaning of the decree of reference, and has as a consequence done unnecessary work, and that the evidence demonstrates that a week's time by a competent accountant would have sufficed to determine the status of the accounts.

And this defendant represents that the said order of reference is not yet final, and that therefore no order for immediate payment against this defendant could be made, as requested; and that the Master's petition for the charge of his compensa-

tion against this defendant proceeds upon the assumption that his report is already the judgment of this Court, whereas until final judgment is entered herein an order charging compensation against a party would have no foundation.

And this defendant further represents that the said [154] exceptions and objections to said report, a copy of which is hereunto appended and made a part hereof, are now pending before this court and undetermined, and that no charge should be made against any defendant until it is definitely determined that there is money owing from such defendant in favor of the party bringing the action; and this defendant verily believes that upon a consideration by this Court of this defendant's said exceptions and objections, the justice of this defendant's contention will be recognized by this Honorable Court and the conclusions of the Master will be overruled and set aside and not adopted as the judgment of this Court; and that the judgment of this Court will be that it appears even from the facts as found by the Master that this defendant owes nothing to the plaintiff trustee for said A. E. Buckman, bankrupt, and that this defendant owes nothing to the Sunset Construction Company, but that instead the Sunset Construction Company is indebted to this defendant in excess of \$36,000 (which in itself will be a total loss to this defendant). That according to the Master's report said corporation owed this defendant \$18,746.22 on February 19, 1915, and the moneys he has received from it since amount to \$13,023.19.

It is submitted that the request for \$5,000 compensation asked for by the Master is most unreasonable; that the Master's report shows that Rauer has acted in good faith in all his dealings, and the liability which is fastened upon him by the Master is upon a technical construction of the law, and in no wise charges Rauer with intentional wrongdoing. That concededly according to the report, Rauer suffers a very great loss in any event; that the report shows that there are no assets of any kind pertaining to the bankrupt estate, other [155] than the property right involved in this litigation; that there can be no recovery by Rauer of any of the costs or expenses of this litigation should it be finally determined that Rauer, instead of being liable to account, is entitled to a judgment against the plaintiff; that Rauer has already been to a very large expense, and the plaintiff, as trustee of a bankrupt estate, is under no liability to reimburse him for his costs or outlays, except to the extent of assets that may come into his hands,—and, as before stated, there are no assets apart from the sum that may possibly be recovered from Rauer in this present litigation.

It appears from the Master's report that his request for the \$5000 compensation is based upon his report that the defendant Rauer is liable to account; that the Master would not have made the request for the \$5000 compensation if his judgment had been in favor of Rauer and against the plaintiff.

While we disavow any thought of charging the

Master with being consciously affected by the foregoing facts and by the circumstance that from Rauer alone could a fund be derived out of which the Master could be paid, yet, it is respectfully submitted that the foregoing matters, developing as they do a most delicate situation, should be taken into consideration by this Court in ruling upon this matter of the Master's compensation.

WHEREFORE, this defendant prays that in fixing the compensation of the Master this Court take into consideration the matters and things here called to its attention, and that no portion of said compensation be charged against this defendant.

H. M. ANTHONY,
GRANT & ZIMDARS.

* * * * *

Received a copy of the within objections this
[156] 25th day of January, 1922.

E. H. WILLIAMS,
CHARLES S. WHEELER, Jr.,
Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 26, 1922. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [157]

At a stated term, to wit, the July term, A. D. 1922, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the city and county of San Francisco, on Monday the 18th day of September in the year of our Lord one thousand nine hundred and twenty-two. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

(Title of Court and Cause.)

**Minutes of Court—September 18, 1922—(Order
Overruling Exceptions to Master's Report,
Etc.).**

The exceptions of Defendant Rauer to the Master's report and to the Petition of the Master for compensation, heretofore submitted, being now fully considered and the Court having rendered its oral opinion, it is ordered that said exceptions to the report be and are hereby overruled and that the compensation of the Master be fixed in the sum of \$1800.00 to be paid by the defendant Rauer in the first instance. [158]

(Title of Court and Cause.)

Oral Opinion—Monday, Sept. 18, 1922.

Overruling Exceptions to Master's Report, and
Fixing Master's Compensation.

Hon. WM. C. VAN FLEET, U. S. District Judge.
Messrs. CHAS. S. WHEELER, CHAS. S. WHEEL-
ER, Jr., and E. H. WILLIAMS, Attorneys for
Plaintiff.

Messrs. ANTHONY, GRANT & ZIMDARS, Attor-
neys for J. J. Rauer.

Oral Opinion.

The COURT. (Orally.)—This is an action by the Trustee of a bankrupt to recover certain property alleged to be the property of the bankrupt although standing in the name of a corporation. The matter was heard and decree was entered, the judgment being that the property was the property of the bankrupt at the time of the bankruptcy and should be recovered into the hands of the Trustee, and directing an accounting at the hands of those in whose hands the property was over a certain period down to the date of the trial.

Exceptions have been filed to the Master's Report, the principal one, and the only one in fact upon which any particular stress was laid, being that the master has wholly failed to appreciate the real character of the decree and that the accounting was had under a misapprehension of its effect. I do not know that counsel in the case are here and

therefore, it not being a matter of general interest, it is sufficient to say that the contention is based wholly upon a misapprehension as to the proper construction and effect of the decree. The complaint alleged, as I have indicated, that the property in [159] question belonged to the bankrupt and that for the purpose of concealing it from his creditors he organized a corporation, in which he held the entire amount of stock, which corporation was organized as a mere cloak under which he managed the property, and that it was his individual property although ostensibly held in the name of the corporation. The decree presented by counsel and signed by the Court simply decreed that the property was at the time of the bankruptcy the property of the bankrupt. Now that determined the issues just as definitely as though the Court had proceeded in accordance with the method followed in the State practice and recited all the facts upon which that decree was based. Under Equity Rule 71 it is expressly provided that a decree shall have only a recital of that which is decreed. You do not recite the facts at all and that omission seems to have given to the mind of counsel a misapprehension as to its effect because it does not recite all the facts underlying the decision that is embodied in the decree. The decree fully meets the ultimate issues presented by the pleadings; that is, that this property (leaving out the recital of the facts upon which the conclusion is based), was the property of the bankrupt, and when the Court decreed that it

was the property of the bankrupt it decreed that the evidence sustained the facts alleged in the complaint which warranted that decree; and that is really all there is in the proposition.

The other exceptions grow out of and are based upon the main consideration that there was this misapprehension on the part of the Master of the effect of this decree. The Master I think, if he committed any error committed it against the parties prevailing as to the extent of the accounting required.

There is one other matter, not an exception to the Master's report but an objection to the amount of compensation requested by the Master. The Master expended some 12 days in the trial, but claims for a period of some 30 days during [160] which the matter was under advisement and being worked on by him and he asks a fee of \$5,000, or a minimum of \$4,200. He claims 30 days, I think, outside of court and 12 days in it, that being 42 days, and he asks for \$4,200 based upon a compensation at the rate of \$100 per day. As I intimated at the argument, I think that the demand is beyond the reasonable limits of the Court's discretionary power in the matter. We aim, of course, to compensate Masters adequately for the labor performed and it is based upon, to a very appreciable extent, the amount involved. There is no fixed standard of compensation for a Master—it varies all the way from \$25 a day up to \$150 and sometimes, in large matters, even higher, but I think that it would be inequitable to have the

parties in this case pay the amount asked. I am of opinion that under the circumstances and having in view the amount involved, time expended and the issues, that \$1800 is a full and ample compensation for the Master; and that will be the amount allowed and it will be directed that it be paid by the Defendant Rauer in the first instance.

The exceptions to the Master's Report will be overruled.

[Endorsed]: Filed Sept. 25, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[161]

(Title of Court and Cause.)

**Order Overruling Exceptions to Master's Report
and Fixing Master's Compensation.**

This cause came on to be heard at this term and was argued by counsel; and, thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows:

That the exceptions of the defendant J. J. Rauer to the report of the Master, which exceptions are numbered I to VII inclusive, be and the same are and each of them is overruled.

That the final report of the Master be and the same hereby is approved and confirmed.

That the Master, H. M. Wright, Esquire, be and he is hereby allowed, given and granted the sum of Eighteen Hundred (\$1800) Dollars as and for compensation for his services herein, the same to be paid by the said defendant, J. J. Rauer, in the

first instance, within 20 days from notice of this order.

Dated September 30th, 1922.

WM. C. VAN FLEET,
Judge of the United States District Court.

[Endorsed]: Filed Sep. 30, 1922. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [162]

(Title of Court and Cause.)

Final Decree.

The Court having heretofore and on the 11th day of September, 1916, made its Decree wherein it adjudged that A. E. Buckman at all times and up to and on the 19th day of February, 1915, was the owner of Sunset Construction Company and of all of the property, books and records of said company, and that on said last-mentioned day said company, property, books and records vested in and became the property of the Trustee of the Estate of said A. E. Buckman, Bankrupt; and having decreed therein that defendants A. E. Buckman, J. J. Rauer, Fillmore Buckman and William H. Chapman severally account for all moneys or property received by them from or advanced by them to defendants Sunset Construction Company since the 12th day of September, 1911; and having further decreed that for the purpose of taking said above-mentioned accounting said cause be referred to H. M. Wright, Master in Chancery of this court, to take and examine said account and report thereon to this court;

And the said parties to this cause having appeared before said H. M. Wright, said Master in Chancery, and said accounting having been had by and before said H. M. Wright, and said accounting having been taken, examined and reported by him to this court; and it having been determined by said report that certain moneys are due from defendant J. J. Rauer to the plaintiff Trustee, but that there is nothing due to said plaintiff from the defendants A. E. Buckman, Fillmore Buckman and W. H. Chapman, or either or any of them; and said report having been excepted to by defendant J. J. Rauer, and said exceptions to said report having been fully argued by counsel [163] for the respective parties to said cause, and, at the March term of this court said exceptions to said report having been submitted to this court for decision, and said cause having been thereupon taken under advisement by this Court and its decision thereof having been continued until the present term,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

(1) That each and all of said exceptions of said J. J. Rauer to said report of and on said accounting had and returned to this court as aforesaid by said H. M. Wright, Master in Chancery, be and the same are hereby disallowed and overruled; and that said report be and the same is hereby ratified, approved and confirmed as a just and true report and account;

(2) That the defendants A. E. Buckman, Fillmore Buckman and William H. Chapman be and they are hereby dismissed from the above-entitled suit and it is hereby decreed that they recover from the plaintiff trustee their costs, charges and disbursements in this suit to be taxed;

(3) That the sum of Three Thousand Seven Hundred One and 60/100 (\$3,701.60) Dollars now deposited with this court in the matter of the bankruptcy of said A. E. Buckman be and the same is hereby declared due to said J. J. Rauer, but it is hereby decreed that the same shall be held and retained by plaintiff, and payment made to said J. J. Rauer by credit on the amount hereinafter declared due to said Plaintiff Trustee from said defendant J. J. Rauer.

(4) That there is now due and payable from said J. J. Rauer to said Plaintiff Trustee, after crediting said sum of Three Thousand Seven Hundred One and 60/100 (\$3,701.60) Dollars now in possession of this court as aforesaid, the sum of [164] Nine Thousand Three Hundred Twenty-one and 59/100 (\$9,321.59) Dollars with interest from the date of rendition of said report, to wit: The — day of December, 1921, at the rate of seven per cent (7%) per annum, the same being moneys belonging to the said Estate in Bankruptcy of said A. E. Buckman, a Bankrupt, and to said plaintiff as the said Trustee thereof and collected and wrongfully retained by said defendant Rauer; and it is hereby decreed that said J. J. Rauer pay to said plaintiff Trustee said sum of Nine Thousand Three Hundred Twenty-

one and 59/100 (\$9,321.59) Dollars, together with interest as aforesaid, forthwith.

(5) That there is due from the Estate in Bankruptcy of A. E. Buckman, a Bankrupt, of which the plaintiff herein is his Trustee, to said J. J. Rauer, the sum of Fifteen Thousand Forty-four and 62/100 (\$15,044.62) Dollars after crediting on the total amount due said J. J. Rauer from said Estate in Bankruptcy the above-mentioned sum of Three Thousand Seven Hundred One and 60/100 (3,701.60) Dollars, and it is hereby directed and decreed that the claim of said J. J. Rauer against said Estate in Bankruptcy in the said sum of Fifteen Thousand and Forty-four and 62/100 (\$15,044.62) Dollars, being the total claim of said J. J. Rauer against said estate, less the sum of Three Thousand Seven Hundred One and 60/100 (\$3,701.60) Dollars credited thereon as aforesaid, be paid to said J. J. Rauer in due course of administration, provided said claim be filed therein in due form within the period of ninety (90) days after this decree shall become final.

(6) That plaintiff Trustee have and recover from defendant J. J. Rauer his costs, charges and disbursements in this suit to be taxed.

Dated October 6th, 1922.

WM. C. VAN FLEET,

Judge of the District Court of the United States
for the Northern District of California. [165]

Due Service and receipt of a copy of the within final decree this 3d day of November, 1922, is hereby admitted.

H. M. ANTHONY,
GRANT & ZIMDARS,
Attorneys for Defendants.

[Endorsed]: Filed and Entered Nov. 6, 1922.
Walter B. Maling, Clerk. [166]

In the Southern Division of the United States District Court, in and for the Northern District of California.

IN EQUITY—No. 233.

GEORGE J. HATFIELD, Trustee in Bankruptcy
of the Estate of A. E. Buckman, Bankrupt,
Plaintiff,

vs.

A. E. BUCKMAN, Bankrupt, J. J. RAUER, WM.
H. CHAPMAN, FILLMORE BUCKMAN,
J. A. MEADOWS, and SUNSET CON-
STRUCTION COMPANY, a Corporation,
Defendants.

Settled Statement on Appeal from an Order or Decree Made Herein on the 11th Day of September 1916, Including the Order Directing an Accounting and Referring the Matter of the Accounting to H. M. Wright, Master in Chancery of This Court, and from the Final Decree Made Herein on the 6th Day of November, 1922, Disallowing and Overruling the Objections

Made by J. J. Rauer to the Account and Report Filed Herein by H. M. Wright, Master in Chancery, Pursuant to the Order of September 11, 1916, and Confirming and Approving Said Report, and Decreeing That the Said J. J. Rauer, Defendant, Pay to the Plaintiff the Sums of Money in the Said Decree Specified.

BE IT REMEMBERED that the above-entitled cause came on for hearing in the August Term of the said court on August 30, 1916, before the Honorable Wm. C. Van Fleet, Judge of the said Court; T. H. Lane, Esq., and Lawrence M. Phillips, Esq., appearing as counsel and solicitors for plaintiff, and H. M. Anthony, Esq., appearing as counsel and solicitor for defendant J. J. Rauer; and at said hearing witnesses were sworn and examined, and documentary evidence introduced, and the substance of the said evidence and testimony, in so far as it relates or has any bearing upon the exceptions filed herein to the interlocutory decree and to the confirmation of the report of the Master in Chancery, and to the Final Decree entered herein, is as follows: [167]

And, first, as to the exceptions in support of the appeal from the interlocutory decree, viz.:

Testimony of Fillmore Buckman, for Plaintiff.

FILLMORE S. BUCKMAN called as a witness for plaintiff, testified as follows in response to questions by Mr. LANE, attorney for the plaintiff:

I am not now an officer of the Sunset Construction Company, but I was the secretary of the Corporation until July 1, 1915.

(Testimony of Fillmore Buckman.)

Mr. Lane called the attention of the court to the fact that it was admitted by the pleadings that A. E. Buckman was declared a bankrupt in February, 1915.

The witness, Fillmore Buckman, then proceeded:

I think A. E. Buckman was allowed Two Hundred (\$200.00) Dollars a month from the Company up to the time I left its employment. The officers of the corporation were: Mr. Chapman was president, Mr. Morey was Treasurer, and Mr. A. E. Buckman was General Manager, and I was Secretary. There were four Directors. I am a nephew of Mr. A. E. Buckman. Mr. Buckman got money from the Company as he needed it to carry on the business. I am not certain what his salary was. There was no fixed amount that Mr. Buckman was allowed for expenses. Some times it ran into the neighborhood of \$500.00 a month in carrying on the business. These expenses were going out of town and examination fees, and different things. Mr. Buckman took whatever money he needed from time to time. He was naturally managing the business. I won't say the business belonged to him, but he was running the business—handling all the outside work. I was looking after some of the contracts myself, but Mr. Buckman needed money for expenses for lines and grades, and his own personal use, and whenever he needed money, he took it. He would come to me and ask [168] for a check and I would give it to him. I believe that it was in the minutes that Mr. Buckman was to have the necessary expenses to

(Testimony of Fillmore Buckman.)

carry on the business. By personal expenses I mean expenses for his own personal use, that is living expenses. He would draw from \$5 up whenever he needed it and everything over his salary was charged up to expenses. He was allowed his expenses over and above the amount charged to his salary. He would account for part of the money, but not all. Sometimes he would bring back receipts for lines and grades. I was never a Director of the Company; always a Secretary.

Testimony of Arthur J. Meadows, for Plaintiff.

Mr. ARTHUR J. MEADOWS called for the plaintiff, testified as follows:

I am not now an employee of the Sunset Construction Company, but I was an employee up to the early part of February of this year, 1916. The position was not paying me, and I left the employment. My employment consisted in looking after the work, going out taking time, keeping a time-book, making up their pay-rolls each week, and general outside work. My salary was \$20.00 a week. I was not giving full time to the employment. I had been employed about a year and four or five months—from October 1914 to February, 1916.

I acquired 10,200 shares of the stock of the Sunset Construction Company about October 1914 for which I paid \$100.00. These shares were then transferred to me on the books of the corporation, either in 1914 or the early part of 1915. I do not know

(Testimony of Arthur J. Meadows.)

what proportion the 10,200 shares acquired by me bore to the entire number issued. The man from whom I bought the shares did not want them, and I said I would take them because I wanted to get a position with the Company. I never investigated to find out what part of the whole capital stock of the Company these [169] shares were. The man came to me and asked me to buy them. I purchased from a man named Mr. Wehrle. I notified the company just after I acquired the shares, but I do not think I had the shares transferred until two or three months afterwards. I had no agreement with anybody as to what I would do with these shares. I know that I owned all the shares of the corporation that had been pledged. I understood that was all the stock that had been issued. I did not know I owned the Sunset Construction Company; I didn't know but what they might issue other stock. Prior to the time I purchased the stock I had not been in the employ of the company; I had been in the collection business for 20 odd years in the City and County of San Francisco; part of the time as a collection agency and afterwards with Mr. J. J. Rauer. I had not been with Mr. Rauer for two years prior to 1914, nor since. I do not know what salary A. E. Buckman received, and I did not know what he was drawing from that concern. I did not inquire into these facts after I secured the controlling interest in the corporation. I did not place much value on the stock. My purpose in getting the stock was to get employment. I thought it would be

(Testimony of Arthur J. Meadows.)

an investment for me to get the work—the work of attending to some of the outside matters, seeing people, and making collections of assessments, for which I got a commission. I bought all the stock of the Sunset Construction Co. for the purpose of handling that business. I did clerical work for the Company. My position was given me by Mr. A. E. Buckman. I did not ask him to change directors or put in directors of my naming. I did not consider that a change in the management was going to affect me. I could not handle the practical part of the work. I bought the stock subject to the claims. I knew there were a lot of outstanding bills against the Sunset Construction Company because the creditors used to come to the office and ask if anything [170] had been collected on the bills. At the time I purchased I knew there would be no further obligations, because at that time Mr. Rauer was advancing money to meet the pay-roll; and also money to purchase the supplies. I knew that there would be no further indebtedness contracted by the company. I asked Mr. Rauer if it was all right and if it was safe to buy the stock. I told Mr. Rauer I would buy the shares of stock if I thought there was a chance of giving me work. I knew there was a big outstanding debt of the Sunset Construction Company at the time I bought. I knew that Mr. Rauer had a mortgage because I investigated that, and I knew there were a lot of outstanding bills for materials and supplies. The mortgage to Mr. Rauer was executed when I was in his em-

(Testimony of Arthur J. Meadows.)

ploy. I was with Mr. Rauer more or less for 15 or 16 years and then I was absent from the City, and had been in business for myself. It was not much business, because I had been sick. After my return from the country, I did not go back into his employ. I asked Mr. Rauer if I could make some collections, and he said he would speak to Mr. Buckman about it, and they gave me a few collections; afterwards I got this other work. I met Mr. Wehrle and he told me he had bought that stock. I told him I would probably be in a position where I could take it off his hands because I wanted to be connected with the Sunset Construction Company. I think I attended one or two meetings of the Sunset Construction Company in the early part of 1916 and latter part of 1915. I do not recall what matter came up at those meetings. I still own that stock. I received a written notice of these meetings from Mr. Chapman, an officer of the corporation. There were no officers elected at this meeting. I am not a director now, but I was a director for some period in 1915, until the company went out of existence and lost its franchise. I do not think there was any change in the directors at that time. [171] At the directors' meeting I voted my stock. I don't know what directors I voted for. I know at one meeting that Mr. Chapman resigned as a director, and I was elected in his place. I have no special recollection about th matter. I never intended to use my stock for making any changes in the directors of the corporation. I understood they had the same officers, Fill-

(Testimony of Arthur J. Meadows.)

more Buckman was Secretary and A. E. Buckman was Manager. I was not going to interfere with the management because I did not understand the work. I do not think there was a stockholders' meeting since I held the stock. I think it was a directors' meeting which I attended. At that meeting there was present, Mr. Chapman and Mr. Fillmore Buckman. Mr. Fillmore Buckman was Secretary. I do not think he was a director. Mr. McCoy was a director. I think he was at the meeting. I was notified to attend the meeting as a director. I have not got a copy of that notice. I understood that I was elected a director on the transfer of my stock.

I knew there would be no more indebtedness incurred after my connection with the Company because they were not running any bills. Everything that was purchased, and the labor, was paid in cash. Mr. A. E. Buckman stated that Mr. Rauer was advancing money so that everything could be paid for in cash. I also asked Rauer.

My collection business brought me from \$100.00 to \$150.00 and I thought if I could increase my income from \$75.00 to \$100.00 a month handling the business of the Sunset Construction Company, I thought I would then be having an income of about \$200.00 a month.

Mr. Rauer was a friend of mine. Mr. Rauer stated it would be safe for me to buy the stock. I could not lose anything because he was advancing money to pay for the work and when the work was

(Testimony of Arthur J. Meadows.)

finished there would be money to be collected on the bills due the Company. [172]

I remember that at the last directors' meeting that I attended the directors were Mr. Chapman, Mr. McCoy and A. E. Buckman. They were the directors.

The COURT.—Now, Mr. Meadows, you testified within the last five minutes that you were satisfied that Mr. Chapman resigned and you were elected in his place. Now was he a director at the time you attended the last directors' meeting?

The WITNESS.—I don't remember whether he resigned or not. I know that there was a resolution passed with reference to some work and I signed it.

I am not positive of the date of the meeting. It was the last of 1914, or the early part of 1916. I do not know what has been done since February of this year. I have not had anything to do with them since then. The corporation lost its franchise. I know there has been nothing done under contract since February of this year. This I know because their work is public work, and I can see what is being done from the records at the City Hall. I know that there has been nothing done under contract since February of this year because I have been out to the Hall and I know about the records and I know the work that has been done. I get my information as to what work they have been doing from the City Hall records because it all goes through the Board of Public Works. I do not get

(Testimony of Arthur J. Meadows.)

my information from the corporation records because I am not doing any business for them at all now. They stopped paying me any salary a few months before I ceased work. They said they were not making any money and that they were going to quit. At the time I quit they owed me about \$130.00, which I have asked Mr. Buckman to pay, and he always told me they were doing some work, and he would put me off saying that when they collected some money they would pay it. Mr. Buckman [173] said "Things are not going just right now, and there is no money on hand, the money is out on contract and they are not collecting the assessments. After I became the owner of the stock I would go up to the office and see what was going on, then see A. E. Buckman, and sometimes Mr. Fillmore Buckman.

The company had some machinery, scrapers and cars. There was a mortgage on this machinery, and I knew there was very little equity in it. I knew that this machinery would not bring 5¢ on the dollar for what they paid for it. It was in such a dilapidated condition. I recommended they should spend some money for repairs in order that they should keep the plant in working order.

On cross-examination by Mr. ANTHONY.

At the time I purchased the stock I was aware that the Sunset Construction Co. owed a great deal of money, and I was aware that it had given a chattel mortgage on all its tools and implements and fixtures and stock in trade. Since I have been

(Testimony of Arthur J. Meadows.)

connected with the company they have been winding up their affairs, trying to get some money out of the work that they had done in order to pay off this indebtedness and the mortgage on the plant.

Since my connection with the company, the company has done considerable street work in San Anselmo, Marin County, and in the Richmond District they were grading a block on 22d Ave., and on the Lincoln Highway, and also some work in Burlingame, and other small jobs, also some work in the Sunset District, and in doing such work labor and material was required.

The COURT.—That work and those contracts necessitated the incurring of obligations, didn't it?

A. Yes, for labor and material. [174]

The COURT.—But you testified here a short time ago that you bought that stock because you knew they were doing nothing that would enable them to incur any obligations.

A. Because I inquired of Mr. Rauer if he would continue to advance money to the company. I bought the stock simply on the assurance of a third party that he was going to advance all necessary expenses to carry on the work. That he would continue to advance the money for labor and material.

I was told by Mr. Rauer that he was going to advance some money to pay for the labor and materials. I do not know whether there was a written contract wherein he agreed to do so. Mr. Rauer advanced money to buy material. I used to go to Mr. Rauer for orders to buy material and go to

(Testimony of Arthur J. Meadows.)

him for money to pay the pay-roll. I could not get any materials without a written order from Mr. Rauer. I could not get any credit in the name of the corporation.

Redirect Examination by Mr. LANE.

The contract at San Anselmo was begun in September or October of last year. The contract at 19th & Kansas Streets in the city was taken the latter part of the year, and was in progress when I quit the employment. The Richmond contract at 14th Avenue, was taken a long time ago, but they did not start the work for a year after the contract was let. It was a private contract for Heyman Bros. The Carolan Estate work in Burlingame was taken the early part of last year and was in progress.

I saw the prices when the contracts were awarded. I could not tell you just the amounts. I could tell you that the Carolan contract amounted to \$12,000.00 or more; there was extra work to do. The San Anselmo contract amounted to somewhere between \$8,000.00 and \$9,000.00. The 19th & Kansas amounted [175] to about \$10,000.00 or \$11,000.00, and the Richmond contract about \$1,800.00, and the 22d Avenue and Lincoln Way, Sunset, about \$4,000.00. I believe there was a profit in these contracts. I do not know what the profit was.

Testimony of Fillmore Buckman, for Plaintiff (Recalled).

Mr. FILLMORE BUCKMAN was recalled and again interrogated by Mr. LANE.

I recall the stock certificate book you show me as that of the Sunset Construction Co. The first entry is a certificate for 50 shares issued to F. W. Simmie on April 19, 1910. The second Sunset Construction Company was organized in 1911. This was so organized because they lost their franchise for the nonpayment of taxes and had to reincorporated. They reincorporated under the same name, and the only reason for reincorporating was on account of the nonpayment of the franchise taxes.

Mr. LANE. Q. That stock certificate book then has nothing to do with the present Sunset Construction Company?

A. No, because the Sunset Construction Company was reincorporated, and, of course, they issued new stock at that time.

I was not secretary at that time and don't know anything about the leaves in the book being torn out.

Turning to that portion of the book where the stock certificates of the present Sunset Construction Company are, we find that the first certificate is one share issued to A. E. Buckman, on April 23, 1915; the corporation was organized in April, 1911. According to that, the stock was taken up and new stock issued.

(Testimony of Fillmore Buckman.)

There was a Sunset Construction Company that was organized last year, and the first certificate of stock was issued in December, 1911. There were 50 shares to A. E. Buckman, and then there were 50 shares to J. Morey on the same day; and also 50 [176] shares to W. H. Chapman on the same day; and then there were 10,000 shares on the same day to W. H. Chapman, J. Morey and A. E. Buckman, trustees for the Sunset Construction Company, and on the same day there was one share issued to J. Morey; 49 shares to J. Morey, as trustee for Buckman, and on the same day one share to W. H. Chapman; and on the same day, 49 shares to W. H. Chapman, trustee for Mr. A. E. Buckman. Those certificates are all dated December 15, 1911. The last entry was on April 23, 1915, when one share was issued to A. E. Buckman and one share to J. Mowry and one share to A. J. Meadows, and one share to W. H. Chapman, and 10,196 shares to A. J. Meadows, all on April 23, 1915.

There is a notation on the last stub of that book as to what stock was turned in for new certificates. I was secretary at the time, but I didn't write that, it was written by Meadows. I do not know what the consideration for the issuance of that certificate for upwards of 10,000 shares was.

Testimony of Sam M. Phillips, for Plaintiff.

SAM M. PHILLIPS, called as a witness for the plaintiff, then testified in substance as follows:

I was one of the attorneys for the Trustee in

(Testimony of Sam M. Phillips.)

Bankruptcy of A. E. Buckman, and was such in the latter part of 1915. At that time the Referee in Bankruptcy made an order directing the secretary of the company to bring into court and exhibit the stock transfer and certificate books of the Sunset Construction Co. I made a memorandum at that time which is on the slip of paper which you hand to me. I do not recall the month when that was made. This stock certificate book was examined by me at that time, and I made that list of the stock certificates which had been issued. It is on the slip of paper which you handed to me. The memorandum is made in my handwriting. The last stub in the stock [177] certificate book is dated April 22, 1915. That stub is not on the memorandum which I made of those certificates which had been issued at the time of my examination. That certificate had not been issued at the time I saw that stock certificate book. The stock was issued to A. J. Meadows. At the time I examined this book I initialed the cover and I still find my initials in it. On that occasion I examined Mr. Fillmore Buckman in bankruptcy and he testified that the salary of A. E. Buckman was \$150 a month and the books of the Company were brought into Court and showed that A. E. Buckman was drawing \$600 and \$700 a month in addition to his salary, as expense money.

Testimony of Jessie Morey, for Plaintiff.

JESSIE MOREY, called as a witness for the plaintiff, testified in substance as follows:

Certain stock in the Sunset Construction Co. was issued to me, but I really never held that stock at all. I was simply a director for convenience. I am a stenographer in Mr. Chapman's office. Somebody else owned all the stock that was issued to me, but I don't know who it was. I think I attended all director's meetings up to the time I resigned in July, 1915, but I do not know who was elected in my place.

Testimony of W. H. Chapman, for Plaintiff.

W. H. CHAPMAN, called as a witness for plaintiff, testified on direct examination in substance as follows:

I was one of the organizers of the Sunset Construction Company. One certificate was issued to me in my name as an incorporator, and I was the legal owner of it, but the beneficial ownership was in Mr. A. E. Buckman. I have no interests in the profits of the corporation. The stock was given to me simply [178] to act as a director. I was the attorney for the company, and the office of the company was in my office. The stock standing in the name of Miss Morey was in the same position as the stock owned by me. She acted for it, or rather for Mr. A. E. Buckman. The beneficial ownership of that stock was in Mr. Buckman. I

(Testimony of W. H. Chapman.)

was a director in the corporation until I resigned about the first of July, 1915. The directors who were elected in the place of Miss Morey and myself were A. J. Meadows and John McCoy. I think the last directors were A. E. Buckman, John McCoy and A. J. Meadows at the time the corporation expired, that is, forfeited its charter, in March of this year. It had previously forfeited its charter, and then other proceedings were had by which it was continued in existence until the second forfeiture of its charter.

Miss Morey and I were simply dummy directors.

I wrote the certificate of stock that was issued on the 23d of April, 1915. The entries were made on that day. I filled in the stock certificates, and on the same day Mr. Fillmore Buckman, who was secretary, signed as secretary, and put the seal of the corporation on. Then other certificates that have been marked in here, that have never been torn out, were not signed by the secretary, and were never in fact issued.

There is no question but what this was made on the date that it is here, that is, in my mind. Originally the corporation forfeited its charter some time in December for nonpayment of taxes, and we contemplated, when we incorporated, the issuance of the certificates shown in the books that are filled out but not signed by the Secretary, to be issued in the place of the old certificates, and the same number of shares [179] issued to the

(Testimony of W. H. Chapman.)

directors of the defunct Sunset Construction Company as trustees for the corporation, the 10,000 and odd shares; we afterwards learned that what we had done in reincorporating was practically a redemption of the right to act, and we went ahead, then, just as though there had been no forfeiture, and considered the old certificates as valid certificates of the corporation.

We did not issue any new certificates; only in lieu of cancelled certificates of the old corporation, all of these that are in here were to take the place of the old certificates, but they are still here, the same number of shares; also that certificate for 10,000 shares, in the name of myself, A. E. Buckman and J. Morey, they are still in the book. That was never issued. I intended to issue that in place of the old.

At the time that corporation No. 1 forfeited its charter, A. E. Buckman, J. Morey and myself were the directors of the old corporation. We were also the directors and incorporations of the new corporation. The original incorporators of the defunct corporation were Simmie, Lewis and J. Morey, and they resigned and Mr. A. E. Buckman and myself were elected in place of two of them. They were simply the first acting incorporators. Mr. Buckman and Miss Morey and myself were directors of the new company and of the old company; the directors were precisely the same.

That certificate for 10,000 shares is signed by

(Testimony of W. H. Chapman.)

Mr. Chapman as president, but it is not signed by the Secretary, and it is not removed from the book.

I would like to explain the absence of leaves in this book, in the first part of it. On the inside of the covering is a statement of a company; that was a corporation formed shortly after the fire, and this was an old stock certificate book of that corporation, and where these leaves had been torn out they [180] were issued for that corporation. They had nothing to do with the Sunset Construction Company. There have been no pages taken out of this book at all in reference to the Sunset Construction Company. At the time the first incorporation of this company was had these leaves were torn out in the front of this book, so as to use it instead of buying another book.

On cross-examination, W. H. Chapman testified as follows:

The original incorporators of corporation No. 1 resigned so that A. E. Buckman, J. Morey and myself became directors of the old corporation. Then, the last corporation, we three were the incorporators and remained the directors until July 1, 1915. On July 1 Miss Morey and myself resigned, and Mr. Meadows and Mr. McCoy were appointed directors in our place.

It was at the time the directors met on the 1st of July; I think Miss Morey resigned first and Mr. Meadows was appointed in her place, and then Mr. Meadows and Mr. A. E. Buckman were there

(Testimony of W. H. Chapman.)

present, and I resigned, and they elected Mr. McCoy; that was the way it was, it is my recollection.

Up to that time, at least, A. E. Buckman was the owner of all the shares of stock of the corporation and Miss Morey and I simply held a share each to qualify as directors.

On redirect examination W. H. Chapman testified as follows:

The stock of the corporation was not issued to Mr. Buckman, but he was the incorporator of the corporation and the owner of the assets. I don't think we had any stockholders' meeting except the original meeting of stockholders to adopt the by-laws. [181]

That is the only stockholders' meeting they ever had.

I could not say that there were any particular instructions given, but whatever business was needed to be done, of course, we were guided by Mr. Buckman's advice.

Mr. Buckman was made general manager, with full power to act. He could borrow money for the company, and I think execute notes for the company. It seems to me sometimes we passed special resolutions giving special power to him; I think we did that in the case of a chattel mortgage, and in some instances with Mr. Rauer. All those proceedings would be found in the minutes.

(Testimony of W. H. Chapman.)

On recross-examination W. H. Chapman testified as follows:

The Meadows stock was transferred to him on the 23d of April, 1915, and it was subsequent to that that I resigned and he was appointed. Prior to that I did not know he owned it. I had been told it had been sold, and he brought in the certificate to the office and asked for a transfer. I knew that that stock had been pledged to Mr. Rauer. I think that I delivered the certificate of stock to Mr. Rauer. Mr. Rauer loaned money to the corporation with which it carried on its business.

Testimony of A. E. Buckman, for Plaintiff.

A. E. BUCKMAN, called as a witness for plaintiff, testified in substance as follows:

I am the bankrupt. I pledged my stock in the Sunset Construction Company to J. J. Bauer. I pledged 10,150 or a little more of the shares of the company that I had. This pledge [182] was made in January, 1914. It was made for moneys advanced by Mr. Rauer to the Sunset Construction Company. We were borrowing money from Mr. Rauer to carry on the business. In making this pledge I just delivered the stock to Mr. Rauer. I could not swear positively, right now, but I believe there was a written instrument signed and delivered.

(Testimony of A. E. Buckman.)

The stock stood on the books of the corporation at that time in Mr. McCoy's name, if I remember right. I am not positive about whether it was the stock of the first Sunset Construction Company—it was the stock that I owned in the company, and I pledged it all with Mr. Rauer for money advanced to the Sunset Construction Company and used in their business, and not by me personally.

At the time we originally incorporated the company, the stock was issued in Mr. McCoy's name, and shares to Mr. Chapman and myself and Miss Morey—I do not know any special reason for it being in McCoy's name, but it was, though.

Mr. LANE.—It does not show in the stock certificate book of the new company. Since the second Sunset Construction Company was organized, there has been no issue of 10,150 shares of stock, and that I did not know until this morning. As Mr. Chapman stated this morning, they formed a new company, and without issuing any stock agreed that the stock issued in the old company should be the stock in the new company; so the only evidence of this stock is the certificate issued by the old company, which, at the time this company was formed, was defunct.

WITNESS (Continuing).—That was merely a pledge to Mr. Rauer for moneys he had advanced. We commenced borrowing money from Mr. Rauer, I think in 1911, and we kept drawing money at different times. We gave him notes or checks

(Testimony of A. E. Buckman.)

which we carried or assignments of money due us and stock in the company—the [183] books show. I was giving Mr. Rauer notes signed by myself as manager. The books will show the money that was got from him at different times. But that money was not advanced to me personally.

I was the incorporator of the company and owned the stock, all of it. Although it stood in the name of people as trustees, I owned the stock, was supposed to own it. I am a director of the Sunset Construction Company now, and the other directors are Mr. Meadows, Mr. McCoy, and myself. I have always been a director. I don't remember the date Mr. Meadows became a director, but I think it was July, or something, 1915. I don't remember the date; the books will show.

Thereupon the minute-book of the Sunset Construction Company was offered and admitted in evidence. Said minute-book contained no record or minutes showing the election, appointment, or other qualification of either A. J. Meadows or McCoy as director of the Sunset Construction Company.

WITNESS (Continuing).—The Sunset Construction Company forfeited its charter, I think in March, 1916, for its failure to pay the corporation franchise tax. I think that tax was some \$60, with some percentage added; I think they have brought suit to recover it; I am not sure. At the time the charter was forfeited Mr. Meadows, Mr. McCoy and myself were the directors.

(Testimony of J. J. Rauer.)

It was here stipulated that Mr. Buckman, Mr. McCoy and Mr. Meadows be brought in as parties defendant, in place of the Sunset Construction Company, the charter of which was forfeited after this suit was brought, as trustees of the Sunset Construction Company, and that the substitution may be had without filing a supplemental bill.
[184]

Testimony of J. J. Rauer, for Plaintiff.

J. J. RAUER, called for the plaintiff, testified on direct examination in substance as follows:

I am the man to whom Mr. Buckman pledged the 10,150 shares of stock in the Sunset Construction Company. The pledge was made in January, 1914, by a pledge note, and the stock was then delivered to me. I have here a copy of the note.

The COURT.—All you are litigating now is the ownership of the stock, I suppose.

Mr. LANE.—The ownership of the stock, and it is my contention that there has never been any valid pledge of this stock.

WITNESS (Continuing).—I was examined before the Referee in Bankruptcy in the spring of 1915. I did not testify that that pledge had been made merely by giving me the shares of stock of the Sunset Construction Company, and that I did not recall that there was any written instrument. On the contrary, I said this: that the concern owed me \$40,000 or \$50,000 and I had that stock pledged

(Testimony of J. J. Rauer.)

with other securities, and if they would pay me they would be welcome to it. The pledge was made in good faith, they gave it to me, and after that I advanced on that security, together with other security, and I told the Referee down there that.

At that time I also had a chattel mortgage on the personal property. It was not in my name; it was in the name of Mr. Wehrle, a relative of mine, but that mortgage is my property.

I took the deed in the name of my niece, because I do that often with loans; I had no reason for it. I have mortgages in different people's names, and then they transfer them to me. I have made that a custom for years, for no special reason at all. I did not do it to cover up property that really belongs to somebody else; not at all; the affidavit and mortgage show that it is their property, and they borrowed so much money; I thought [185] it made no difference who they borrowed it of, as long as they got the money.

Besides real property and this stock there were some contracts; they had a contract with Mr. Carolan that they thought they were going to make quite a sum of money out of, and when the matter got through they lost \$7,000 or \$8,000. Those contracts were assigned to me. I loaned about \$8,000 worth on the deed of the real property and my account gives credit for it.

(Testimony of J. J. Rauer.)

On cross-examination J. J. Rauer testified in substance as follows:

The first money transaction I had with the Sunset Construction Company was in the year 1911, and from that time to date they are indebted to me for moneys advanced. This is a book of original entry that I kept myself.

The COURT.—I am not going into an accounting of that kind. My theory of this case is that if this stock belongs to Buckman, a decree will go to that effect, and an accounting will be had; otherwise, I do not care anything about it. He admits that he simply holds it as a pledge, that it never was sold to him, that it was simply assigned to him. The only question is, whose property was it? If it was Buckman's property, they will be entitled to a decree, and then an accounting as to the present rights will be had before a Master.

WITNESS (Continuing).—The stock that was pledged to me on the \$20,000 note,—I sold it at open sale and gave notice before I made the sale. I served notice on Mr. Buckman and regularly held the sale on August 12, 1914. I did this under your direction, Mr. Anthony. I found that the concern was not satisfactory to me, and I did not want to be obligated to a large [186] number of creditors which they have now, and my contract was finished.

I had a formal sale of the stock, and the stock was purchased at that sale. I did not become the

(Testimony of J. J. Rauer.)

owner of that stock. I gave notice it was to be sold at 12 o'clock on August 12 at my office. I have no copy of that notice; I gave it to Mr. Anthony.

Mr. ANTHONY.—I have no copy of the notice; I gave it to Mr. Buckman.

Mr. BUCKMAN.—I have no copy of that notice that I remember of.

Testimony of Louise Brown, for Plaintiff.

LOUISE BROWN, a witness for plaintiff, testified in substance as follows:

I am a creditor of A. E. Buckman and of his estate in bankruptcy and have been such for over two years. My claim is based upon a judgment against him for \$15,000. Mr. Buckman stated to me in reference to my claim that before he would pay my claim he would see me in Hell first—before I would get one dollar of his money. He also said he would go through bankruptcy and would even go to State's prison before he would pay me. He said the same thing to my attorney, Herbert Choynski. Mr. Buckman hears me and knows that I speak the truth.

Testimony of J. J. Rauer, for Defendant.

J. J. RAUER, called as a witness for the defendant, testified on direct examination as follows:

The two signatures on the paper shown to me are the signatures of Mr. Buckman. I gave notice of the sale of the shares of stock under the pledge by written notice, and notifying them I would sell

(Testimony of J. J. Rauer.)

the shares. That notice was given two days before the sale. I told them verbally about it also. I told them I wanted to sell the stock. I did sell the stock. I sold [187] the shares for \$50.00, and I turned the shares over to the purchaser. The purchaser was Mr. Wherle. I actually delivered the stock to him and he paid me the money and since then I have not had possession of the shares.

At the time the Sunset Construction Company gave me the promissory note for which the shares were pledged by Mr. Buckman, the Company was owing me \$20,000.00, or more, and the note was given to secure the money I had advanced and to be advanced. After the note was given to me I advanced \$24,770.00 and I have advanced a shortage of \$10,000.00 more, and the dates and the amounts of these figures are in the papers you show me—these checks. These checks represent actual money from me. They would get money from me, and they would give me a check, saying, “Mr. Rauer, I am going to get money,” and then they would give me an assignment of their contract.

The Carolan job in Burlingame, they lost \$7,000; I did not get anything out of it, not a cent; at San Anselmo I went over there and loaned \$1,400, I paid every bill that there was against them for labor and material, and everything I lost. I have taken people’s word for getting money back, and, of course, I have done wrong. I let my judgment get the best of me.

(Testimony of J. J. Rauer.)

The actual loss was about \$24,000 or \$25,000 or \$26,000 that I did not get back. The greatest amount of indebtedness due to me at any one time was as high as \$55,000 or \$60,000. I have gotten some of that money back. If I was to figure it up I would have a loss of between \$24,000 and \$25,000; that is what I have been loser in five or six years.

An instrument purporting to be a chattel mortgage by the Sunset Construction Company, signed by A. E. Buckman, General Manager, and acknowledged by him with the usual certificate attached, [188] that it was not given to delay, hinder or defraud creditors, and prefaced by a general resolution of the Sunset Construction Company, authorizing the making of this chattel mortgage and the promissory note, was then introduced in evidence, the signatures of Mr. Buckman and Mr. Wehrle thereto and the instrument having been identified by the witness.

WITNESS (Continuing).—Mr. Wehrle is my brother-in-law, and he is the man this stock was sold to when I sold it. Then Mr. Wehrle in turn transferred it to Mr. Meadows. He is not connected with me in business. I have been out of business for six years, but I have had collections on different contracts that I turned over to him to make whatever money he could out of it. I have not been in the collection business for I think now four or five years.

Witness was then shown an instrument, the signature of which he identified as Mr. Buckman's, and which instrument purported to be a promissory note

(Testimony of J. J. Rauer.)

dated June 16, 1914, payable one day after date, for the sum of \$5,000, signed by A. E. Buckman, General Manager of the Sunset Construction Company, with the corporate seal attached; also another promissory note, dated June 18, 1914, made by A. E. Buckman, General Manager of the Sunset Construction Company, for the sum of \$10,000.00 in favor of H. Wehrle.

Witness testified that he gave these sums of money for the purpose of these promissory notes,—\$5,000 and \$10,000—and that as security had a mortgage on the plant. That is the chattel mortgage he is reading there, and those are the notes that accompanied the chattel mortgage. Witness testified that he foreclosed the chattel mortgage and purchased it for \$7,500, leaving a deficiency judgment.

The notes and mortgage were introduced in evidence. [189]

WITNESS (Resuming).—From March 29, 1915, up to the present date, I have had transactions with them.

They would get a contract, for instance, like Kansas Street, they would give me that contract, and I would file the assignment at the City Hall—they would get the work; they would say “I have taken that for so much a yard,” and I would go and ask some friend of mine, like Flynn & Tracy, and they would say there ought to be a couple of thousand dollars in it, and then there would something come along, like at San Anselmo, instead of making \$2,000 or \$3,000, there would be a loss of \$1300 or \$1600, but I had to go on and see it through.

(Testimony of J. J. Rauer.)

The Kansas Street work, that was a public contract. It was transferred in the City Hall, and the assessment issued to me. I lost money on it; it was not profitable.

The San Anselmo job was a public contract, the same way. It was assigned to me, and on the strength of that assignment I advanced the money for the doing of that work, and paid all the bills on that job,—every dollar—and there was a deficiency of about \$1,400 which I lost.

The Sunset Construction Company had its office on Post Street, in the second story of the Lick Building. I did not have my office there. I never had my office with the Sunset Construction Company. I had nothing to do with the Sunset Construction Company's office. I did not have any supervision of the accounts of the Sunset Construction Company. I had nothing to do with it, nothing at all. Mr. Fillmore Buckman acted as bookkeeper of the Sunset Construction Company and collected moneys for them. I never heard anything about what salary Mr. Buckman was getting until I got in the bankruptcy court, when I ascertained that Mr. Buckman was receiving large sums of money. I told him he could get \$50.00 a week for managing this thing, and no more. [190]

Thereafter I had a general supervision of the accounts and I would not allow any more contracting of bills except in my name.

The office of the Sunset Construction Company

(Testimony of J. J. Rauer.)

is there yet. I did not do anything in regard to the rent; I had nothing to do with it.

By saying I supervised the bills and everything with reference to it, I mean I paid for the material and paid for the labor; it was all charged to me, and I have the bills for it right here in my hand. If I had not paid the bills I would have lost it all, I had to do it. I did not endorse the fact that Mr. Wehrle paid me \$100 for the stock upon the note that I held. I did not get \$100. I got \$50. I didn't endorse the receipt of the \$50 on the note. [191]

Thereupon the Court made its interlocutory decree and order of references as follows, viz.:

(Title of Court and Cause.)

“Interlocutory Decree.

This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz.:

1. That A. E. Buckman at all times, and up to and on the 19th day of February, 1915, was the owner of all the issued and outstanding capital stock of the Sunset Construction Company, a corporation, and that on said last-mentioned day said stock vested in and became, and now is, the property of R. Cords, Jr., as trustee of the estate of A. E. Buckman, bankrupt.

2. That A. E. Buckman at all times, and up to and on the 19th day of February, 1915, was the

owner of the Sunset Construction Company, a corporation, and of all of the property, books and records of said company, and that on said last-mentioned date said company, property, books and records vested in and became, and now are, the property of R. Cords, Jr. as trustee of the estate of A. E. Buckman, bankrupt, and that said property be held by said Cords pending an accounting between said company and defendants A. E. Buckman, J. J. Rauer, Filmore Buckman and Wm. H. Chapman.

3. That defendants A. E. Buckman, J. J. Rauer, Filmore Buckman, and Wm. H. Chapman severally account for all moneys or property received by them from, or advanced by them to, defendant Sunset Construction Company since the 12th day of December, 1911, whether such transactions were made in the name of third persons or in the names of said parties, for the purpose of determining what claims, if any, exist between said company and said persons. [192]

4. That for the purpose of taking such above-mentioned accounting said cause be referred to H. M. Wright, Master in Chancery of this Court, to take and examine said account and report thereon to this Court.

Dated, September 11th, 1916.

WM. C. VAN FLEET,
Judge of the District Court of the United States
for the Northern District of California."

Pursuant to said order of reference the testimony was heard before H. M. Wright, Master in Chancery, and the hearings were had on October 29, 30th, and 31st, November 2d, 6th, 8th, 16th and 30th, De-

ember 6th, 1919 and March 1st, 3d, and 10th, 1920, and at said hearings before the Master the parties hereto appeared, plaintiff being represented by Edwin H. Williams, Esq., and the defendant, J. J. Rauer, by Messrs. H. M. Anthony and M. J. Green, the following testimony was taken and evidence adduced, viz.: [193]

Testimony of J. J. Rauer, for Defendant (Recalled).

J. J. RAUER, called as witness for the defendant, testified in substance as follows:

The account which I present and which is marked Exhibit 1, was prepared by me from written data and from my books. From March 19, 1911 to November, that year, the Sunset Construction Company got indebted to me for \$15,000 which my books will show, and I demanded security. They conveyed some lots to me as security and as the interest I was charging was a little steep I permitted them to place a mortgage on the lots which they had conveyed to me. They realized \$6734.16 on that mortgage and paid me the money. That was the Straud mortgage. That left a balance of \$6,000 due to me and, long afterwards, I took an absolute conveyance of the lots which the Company had originally given to me as security and allowed them a credit of \$6000 to close the transaction. The dates of the receipt of the \$6,734.16 and the date of the credit of \$6,000 for the lots which were conveyed to me show in my account. I also have here a check for \$1500 dated July 11, 1917 which represents money I received from Taylor. This was money that came due to me on the account above mentioned. I loaned the

(Testimony of J. J. Rauer.)

money for the purpose of financing the street work contracts of the Company and the Taylor contract was done before 1912 but Taylor contended the money was not due from him until the work on the other side street was finished and so he did not pay the money until 1917.

That he started to lend money to Sunset Construction Company on March 19, 1911, and continued to lend it money until November 1916; that the accounts and the supplemental account which he prepared in accordance with the Master's order and which were introduced in evidence and marked Defendant's Exhibits 1 and 2, show all the transactions between himself and the Sunset Construction Company and that they are full, true and correct accounts of said transaction. [194]

These accounts show that the amount owing to J. J. Rauer by the Sunset Construction Company on account of said transactions on February 19, 1915, over and above all set-offs or credits that said Sunset Construction Company is entitled to, is the sum of \$36,807.04, and that the amount owing to J. J. Rauer from the Sunset Construction Company on account of the transactions between them since February 19, 1915, is the sum of \$18,561.54 after giving credit for all collections made by J. J. Rauer and all claims and credits that the Sunset Construction Company is entitled to, and that this sum of \$18,561.54 is outside of and beyond said sum of \$36,807.04 owing February 19, 1915, thus making the total sum owing to J. J. Rauer by the Sunset Construction Company on account of all transac-

(Testimony of J. J. Rauer.)

tions between it and J. J. Rauer since March 19, 1911, the sum of \$55,368.58.

The Sunset Construction Company never borrowed any money from Nat Boas directly, but all transactions covered by my account, were transactions where the money was borrowed directly from me, whether the money borrowed was my money or whether I borrowed it from Nat Boas, J. A. Miller or any one else. This transaction of \$8260 mentioned in the account was one where I obtained the money from Nat Boas and loaned it to the Company. The amount due me from the Company on December 3, 1913, was \$20,000 and the Sunset gave me its promissory note to cover this indebtedness. That was the full amount then due outside of these checks, dated May 20, 1914, for \$8,260. I did not make oath that the full amount due me from the Sunset Construction Company on December 3, 1913, was \$20,000 and the answer filed in this proceeding was not my answer. The balance shows on my books as \$20,000. The checks for \$8,260 came in after the date of that balance, so that it is correct that the full amount of the balances due me on December 3, 1913, was \$20,000 and that is the [195] amount shown on my books and alleged by me in my answer here on file to be the correct amount due. That is the amount due after striking a full account of all debits and credits prior to that date, December 3, 1913. On the date of that balance I held securities from the Sunset Construction Company, consisting of the fifteen lots which I have already mentioned and which were mortgaged to Straud,

(Testimony of J. J. Rauer.)

and also held an assignment of the moneys due from Taylor which I have mentioned. The Straud mortgage was for \$9,000 but I only got \$6,734.16 out of it. I have here an original assignment dated July 26, 1911, which shows the assignment as security from the balance due me from the Sunset Construction Company of the following contracts:

1. Contract of Dec. 4, 1910, made by Taylor Estate for grading certain lands in Outside Land Block 748.

2. Contract dated June 8, 1911, made by Joseph Estate Company for grading and improving streets in O. L. Blk. 744.

3. Contract with Sol Getz and other owners to grade, macadamize and curb 27th Avenue between I. and J. Streets.

4. Contract dated February 11, 1910, made by Sterling Realty Co. for grading O. L. Blk. 848 and improving streets. Subject to an order in favor of a bank for \$1,500.

The assignment witnesses that it was passed by resolution of the Company and is under its seal and executed by its officers. When I took over the 15 lots from the Sunset Construction Company we fixed their valuation by agreement between Mr. A. E. Buckman and myself.

The plaintiff introduced in evidence the verified petition of J. J. Rauer filed in this proceeding after the Federal Court had set aside proceedings on the chattel mortgage taken by J. J. Rauer in the Superior Court in which defendant Rauer requested the District Court to sell said property mortgaged.

(Testimony of J. J. Rauer.)

to him by the chattel mortgage and to foreclose the same, and which said petition was verified on November 13, 1916, and in which said [196] petition Defendant Rauer set forth that the amount owing to him from the Sunset Construction Company on March 15, 1915, and which amount was secured by said chattel mortgage was the sum of \$28,874.82.

J. J. RAUER further testified that the first note given him by the Sunset Construction Company on account of his advances was a note for \$15,000 to cover part of his advances, and that the first security given to him was to secure the payment of said note, and was by way of a deed to 15 lots of land, which lots of land the Sunset Construction Company had taken in the name of W. H. Chapman, their president, and which lots were conveyed as such security to Viola Clark, niece of J. J. Rauer's, for him and as security for the payment of said note for \$15,000.

That after the giving of said note and deed the Sunset Construction Company wanted to relieve itself of the high interest which it was paying to J. J. Rauer, and J. J. Rauer permitted the mortgaging of said lots to raise \$9,000 of which \$9,000 they paid him on account of said note and advances \$6,734.16, the Sunset Construction Company using the balance of said \$9,000 for the payment of prior liens against said 15 lots, and that the note secured by said deed by way of mortgage was by said transaction reduced by the sum of \$6,734.16; that there had also been assigned to him a contract from the Taylor Estate for the sum of \$1500 as further

(Testimony of J. J. Rauer.)

security for said note, which assignment had been made about the time of the execution of said note, but that the collection of said amount from the Taylor Estate was not made by him from the Taylor Estate until July 20, 1915. That on December 7, 1915, he agreed to accept in full payment of the balance of said note of \$15,000 so secured by said deed (and which balance was roughly figured at \$6,000) a quit-claim deed of said Sunset Construction Company for said lots; in other words, taking the [197] equity in the lots for the balance of the mortgage thereon thus closing out that transaction, said \$15,000 note being so settled by the application of the \$6,734.16 on January 25, 1912, and the Taylor Estate assignment of \$1500 and the said agreed value of the equity of \$6,000.

The Supplemental Account, Defendant's Exhibit 3, rendered and made by J. J. Rauer and testified to by him as correct was introduced on December 6, 1919, and is as follows, viz.: [198]

Defendant's Exhibit No. 3.
AMENDED AND SUPPLEMENTAL STATEMENT OF
J. J. RAUER ON ACCOUNTING.

		1911				
1911						
Mch. 9	Ck	#7805	\$ 490.00	Mch. 21	%	\$ 500.00
11	Dist.	"	10.00	May 17	"	475.00
May 17	Int. Miller		75.00	July 10	"	1000.00
" 18	Ck.	8390	400.00	22	"	500.00
June 15	"	8564	2500.00	Oct. 2	"	640.00
"	Dist.	"	150.00	" 25	"	640.00
27	Ck.	8632	1000.00	Nov. 10	"	640.00
July 11	"	8732	500.00	10	"	1000.00
27	"	8855	2955.00	1912		
"	Dist.	"	45.00	Jan. 25	" Mortgage	6734.16
Aug. 22	Ck.	9029	1000.00	1915		
28	" Aug. 24/11	9051	950.00	July 20	Taylor Est.	1500.00
"	Dist.	"	50.00	Dec. 7	% Mortgage	6000.00

26	Ad Panama Co.	25.00
28	Ck.	11589 1500.00
28	Ck.	11589 100.00
Nov. 11	Ck.	11680 1500.00
"	Loan	" 1000.00
"	Dist.	" 100.00
19	Ck.	11729 325.00
"	Dist.	" 25.00
		<u>\$21,151.24</u>

[200] 1912			1912		<u>\$21,151.24</u>		<u>Page 2</u>	
Nov. 25	Balance		Nov. 29	%	\$	10.00		
	Bal. on 15 M	\$8000.00	"	"	750.00			
	Loan	2000.00	Dec. 2	"	5.00			
	"	1075.00	9	"	500.00			
	"	2600.00	13	"	2500.00			
	"	350.00	14	"	2600.00			
	"	1600.00	"	"	1250.00			
		<u>\$15,625.00</u>	"	"	7.50			

Nov. 25	Ck.	#11772	1175.00	1913	
"	Dist.	"	75.00	Jan. 14	1200.00
27	Ck.	11785	750.00	Feb.	734.00
"	Dist.	"	15.00		12500.00
29	J. Sauer & Block cash		7.50	Allowance	
Dec. 5	Ck.	11838	500.00	Balance	
"	Dist.	"	20.00		
14	Loan		3700.00		
"	P. P. I. E. ck. ret'd.		2500.00		
1913					
Jan. 27	Ck.	12157	2000.00		
"	Int.	"	100.00		
Feb. 8	" on 2500 to Feb. 14		125.00		
"	" " 8000 " " 18		120.00		
"	" " 1075 " " 13		16.00		
"	" " 2000 " " 25		30.00		
"	" " 1600 Dec. 28 to Feb. 28		48.00		
"	Ck. Jan. 13/13	#12182	2000.00		

"	Dist.	"	75.00
"	Ok. Feb. 5/13	#12228	1000.00
"	Dist.	"	25.00
			<u>\$22,406.50</u>

\$22,406.50

Feb. 14	Balance		March	12	%	1,500.00
26	Ok.	#12362	"	22	"	3,000.00
"	Dist.	"	"	28	"	490.00
Mch. 1	Cash		Apl.	14	"	1,000.00
3	Ok.	#12379		24	"	670.00
19	"	12481		28	"	1,611.00
20	"	12474	May	14	"	1,330.00
Apr. 1	"	12556		21	"	1,300.00
"	Dist.	"	June	4	"	300.00
Forward						<u>\$11,201.00</u>

Page 3

(to page 4)

[201]

1913	From Page 3,		1913	From Page 3	
Apl. 4	Ck. Miller		Jul. 30	%c	\$11,201.00
May 19	Ck. May 17/13	#1	" "	" "	300.00
" "	" Mar. 25/13	#12520	Aug. 1	" "	1,500.00
22	Note		" "	" "	480.00
June 2	Ck.	24	Sep. 5	" "	160.00
3	"	33	" "	" "	200.00
"	Dist.	33	25	Horse	960.00
Jul. 10	Ck.	86	Oct. 14	Automobile	90.00
15	Int.		Nov. 10	%c Boas	525.00
30	City Hall		" "	" "	1,980.00
30	Ck.			Allowance	1,500.00
"	City	116		Balance	64.00
Sep. 5	Automobile				12,500.00
5	Horse				
5	City loan, Boas				
"	Dist.				

Nov. 10	Dempsey Horse	22.00
15	"	20.00
22	"	10.00
26	"	2.50
30	"	5.00
Dec. 3	"	5.00
		<u>\$31,460.50</u>

\$31,460.50

33,084.95

Balance

1914			
Jan 1	Balance	\$12,500.00	
May 20	S. S. Co. Clk.	8,260.00	
Aug. 22	"	500.00	#5179
27	"	1,000.00	6301
Oct. 5	"	1,310.00	6285
13	"	800.00	6777
14	"	750.00	6886
Nov. 12	"	1,000.00	6885
16	"	750.00	7213
Dec. 11	"	500.00	7290
1915			7592

Entered from

checks on

file in the

Clerk's

Office.

W. A. CLARK.

[illegible]

Oct. 16	"	6903	"	432.50	Aug. 31	"	2.25
1915					Oct. 1	"	75.00
Feb. 8	"	8256	"	330.50	Hittell Contract		
					Jul. 19	%	1,381.11
					" "	"	4,140.34
					Carolán Contract		
				6.50			
				4.10	Jul. 8	%	300.00
				22.00	" 31	"	19.70
					" "	"	91.85
					" "	"	2,519.07
1916					" "	"	1,191.67
Jul. 17	McKenzie filing suit			6.50	" "	"	14.99
	" Summons			3.00	" "	"	537.47
	" Attachment			13.50	" "	"	67.89
	" Lis Pendens			2.10	Jul. 3	"	
	" Attorneys fees			30.50			
	" Calendar fees			2.00	28th bet. I & J Contract		
1915					as per statement		\$4,102.80
May to	Carolán Contract:						
Aug.	as per account			4,559.69	McKenzie Contract:		
1915					1913, Jan. 31		
Feb. to	Hittell Contract:						
Aug.	as per account:			4,953.40	in full		300.00

1915		Balance	38,138.29
Feb. to	28th Ave. bet. I. & J. Contract:		
Oct.	as per account	5,048.09	
1915			
July	Academy of Science Contract:		
	as per account	588.85	
1915			
July	Lawton & 45th Contract:		
	as per account	165.50	
		<u>\$54,113.18</u>	
1915			\$54,113.18
	Feb. 18, Balance	<u>\$38,138.29</u>	
[203]		Forward to Page 6.	Page 5.

26	Ristueci	)	2.25
26	Da Monte	)	12.00
26	C. Timonthy Cash		2.00
June 21	Meat, etc.	12	30.00
14	H. Downey	13	.80
14	P. Deyneka	14	7.05
14	McCoy Cash		5.00
May 27	Switching	15	2.50
26	Meats, etc.	16	30.00
28	" "	17	14.65
28	Powder	18	9.30
June 1	Meats, etc.	19	16.45
May 28	Gasoline Cash		1.90
June 1	Rappage (Cash		14.25
1	Dimmick (from		3.30
1	Fitzgerald (J. J. Rauer		11.80
2	Boswell	24	18.95
3	Barley & Meat	25	50.00
1	Labor	26	75.00
23	Shaw, C. Bal.	23	10.00

23	Bijord	17.85
23	Duggan	6.35
23	Daley	3.70
23	Cochran	4.30
23	Olsen	6.65
23	Antonelle	25.35
21	S. P. Co.	40.00
21	Graves	26.14
25	S. P. Co.	30.00
25	McMahon	15.25
26	W. E. Ellis	10.00
28	W. E. Ellis	122.50
July 28	Feed, etc.	24.00
June 28	McCoy	50.00
28	"	10.00
July 10	"	25.00
3	"	25.00
26	Waterhouse Co.	73.10
	Cash	
		38
		39
		41

Aug. 31	R. White	42	9.75
Mar. 20	J. C. Kennedy	43	31.00
June 11	Meats, etc.	44	10.00
5	A. E. Buckman	45	10.00
11	"	46	5.00
20	"	47	5.00
22	"	48	5.00
Forward			<u>\$4,469.69</u>

[205]

CAROLAN CONTRACT

June 22	A. E. Buckman	49	\$4,469.69
26	"	50	35.00
July 1	"	51	10.00
3	"	52	5.00
15	"	53	35.00
PROFIT			5.00
			<u>182.95</u>
			<u><u>\$4,742.64</u></u>

No interest charged on this A/C for moneys advanced to complete contract.

[206]

\$4,742.64
(Page 1.)

\$4,742.64

\$4,742.64

Page 2.

1915		HITTELL CONTRACT	1915
		#1 \$ 78.15	July 19 %
Feby. 25	Pay Roll	2 93.30	" "
Mch. 19	"	3 120.95	
22	"	" 171.20	
Apr. 10	"	4 234.60	
15	"	5 236.35	
23	"	5 170.35	
30	"	6 163.83	
May 8	"	7)	
18	"	")	
25	"	")	
31	"	")	
June 9	"	") 1,681.80	
17	"	")	
25	"	")	
30	"	")	
Jul. 10	"	")	
Feby.	Stock Hire	12.00	
Mch.	"	43.50	

\$1381.11
4140.34

Apl.	"		250.00
May	"		328.50
June	"		306.00
July	"		166.50
Aug.	15	Enterprise Elec. Co.	100.00
	16	"	85.00
Jun.	9	Meese & Gottfried	39.00
	15	Enterprise Elec. Co.	100.00
	19	Meese & Gottfried	29.29
	20	"	12.45
	26	Marshall Newell	10.90
	32	Machine Batt.	13.00
Jul.	10	D. English, labor	9.00
	14	E. J. Morser	15.00
	"	Meese & Gottfried	29.29
	23	H. N. Cook Co.	8.60
June	26	P. G. & E. Co.	65.30
	"	"	20.00
	"	"	24.00
		#25	
		26	
		27	
		28	
		29	
		30	
		31	
		32	
		33	
		34	
		35	
		36	
		38	
		39	
		40	

Jul.	23	Meese & Gottfried	41	24.10
	28	"	42	2.20
	31	"	43	27.54
Jun.	11	Labor	44	15.00
	10	"	45	72.55
May	6	F. S. Buckman	46	45.00
June	28	"	47	22.85
Jul.	31	"	48	25.00
	30	A. J. Meadows	49	10.00
	21	"	50	20.00
	16	"	51	15.00
	26	"	52	15.00
	25	A. E. Buckman	53	15.00
	"	"	54	20.00
	29	"	55	5.00
		PROFIT		568.05
				<u>\$5,521.45</u>

No interest charged in this account for Moneys advanced to complete contract.

[207]

\$5,521.45

Page 3.

28TH AVE. BETWEEN I. & J. CONTRACT.

1915		1915	
July	Pay Roll	\$ 639.25	Oct. 1 Meyers
Aug.	" "	974.55	1 Mrs. Richmond
Sept.	" "	1029.80	Dec. 3 " "
Oct.	" "	101.15	Oct. 1 J. F. Block
July	Stock Hire	429.00	1 Isendorfer
Aug.	" "	565.50	4 J. F. Block
Sept.	" "	618.00	4 M. Baudette
Oct.	" "	76.50	28 Sarah Evans
July 14	Line and Grade	1 27.00	28 M. Egan
Aug. 15	Meese & Gottfried	3 15.65	Nov. 6 J. F. Block
6	" "	6 29.05	23 " "
21	Hall El. Co.	9 20.00	Dec. 3 " "
25	" "	10 12.40	Nov. 6 M. Sproutt
Sept. 12	Meese & Gottfried	13 16.00	Dec. 3 " "
2	Con. Steele Co.	14 10.50	Nov. 6 S. Coons
2	P. Koenig	15 17.85	Dec. 2 " "
2	" "	16 134.00	
			\$ 385.00
			10.00
			10.00
			50.00
			100.00
			50.00
			250.00
			275.00
			500.00
			50.00
			50.00
			10.00
			10.00
			20.00
			20.00

July 16	Sac. Brick Co.	17	9.00	1916		
17	" "	17½	2.25	Jan. 8	M. Sproutt	10.00
13	Gladden & McBean	18	113.00	Feb. "	"	10.00
Sept. 17	Examination	21	16.00	Mar. 9	"	10.00
	Great Western	23	21.85	Apl. 10	"	10.00
July 31	Hall El. Co.	24	20.00	May 8	"	10.00
Sept. 20	Gladden & McBean	25	149.79	June 10	"	10.00
				Aug. 16	"	10.00
				Oct. 19	"	20.00
				Dec. 15	"	20.00
				15	Mrs. Richmond	10.00
				Jan. 6	J. F. Block	50.00
				14	Meyer	15.00
				17	J. F. Black	85.00
				Oct. 4	"	150.00
				Jan. 22	Jas. Smith	100.00
				Oct. 4	L. Samuels	250.00
				"	Hammond	125.00
				Jan.	Mrs. Samuels	125.00
				Dec. 3	L. Meyers	75.00

Feb. 3	S. Coons	20.00
Mar. 6	"	20.00
Jan. 31	"	20.00
Apl. 5	"	20.00
June 10	"	17.50
28	Jas. Smith	347.70
18	"	100.00
14	" Aug. 1/16	49.60
0	"	106.00
	} Mrs. Joy	300.00
	Mrs. Richmond	20.00
	"	10.00
	"	10.00
Mar. 28	"	10.00
May 1	"	10.00
June 2	"	10.00
July 12	"	57.00

LAWTON & 45th AVENUE.

		1916		
Norton Suit	\$ 9.50	Dec. 24	Georgia Brown	\$181.00
Biggs "	9.50	" "	" "	139.00
Notary fees	2.00	Mch. 28	Norton	75.00
Calendar " (2 suits)	4.00	Jan. 29	Briggs	75.00
Atty. fees	30.00	1915		
Reporter fees	2.50	Dec. 5	Mrs Cassidy	118.00
Team Hire	100.00			
Examination	8.00			
PROFIT	422.50			
	<u>\$588.00</u>			<u>\$588.00</u>
				Page 5.

(Testimony of J. J. Rauer.)

J. J. RAUER further testified that on December 12, 1913, an account was struck between him and the Sunset Construction Company which showed that at that time they were owing him \$20,000.00, for which they gave their promissory note, and besides owing him unpaid checks of \$8,260.00 and \$3,000.00.

That at said time he took a pledge of the stock of the Sunset Construction Company owned by A. E. Buckman, as security for said promissory note of \$20,000; that besides it was his practice in advancing money on any jobs to the Sunset Construction Co. to take an assignment of the contract for that job.

That in June, 1914, the pledge of the stock not appearing sufficient to him, he had the Sunset Construction Company execute to him two promissory notes—one for \$5,000.00 and one for \$10,000,—to partly cover the indebtedness owing him by the Sunset Construction Company and had the Sunset Construction Company give him a chattel mortgage securing the payment of said notes, which said chattel mortgage mortgaged all the equipment and personal property of the Sunset Construction Company as security therefor; that this mortgage was made in the name of H. Wherle, as trustee for him.

That up to the time that he took the \$20,000.00 note and the check for \$8,260.00, and the check for \$3,000.00 as a settlement of the account between them, which was December 12, 1913, he had kept regular books and charged everything up, but

(Testimony of J. J. Rauer.)

that after that date when they would borrow more money from him, he would simply give them the money, or his check, and take their check in return, and that the \$10,000.00 and \$5,000.00 notes were given to partly evidence the checks that he so held against them, and which in that manner could be secured by the chattel mortgage. [210]

The \$20,000 note covered the full amount of the indebtedness due me from the Sunset Construction Company on December 3, 1913, but I took two other notes, one for \$5,000 and one for \$10,000 in order to hold collateral. I took stock as security for the \$20,000 note and when the security was not justified I took a chattel mortgage. I held three promissory notes and they represented the same indebtedness, but I held different collateral. I collected interest at $1\frac{1}{2}\%$ a month for a time up to the execution of the note for \$20,000 and afterwards at the rate of 2% a month. That is I tried to collect interest, I charged it up. I did not actually receive monthly payments of upwards of \$400 a month as interest on this account from December, 1913, to the end of the year 1914. I don't remember receiving any interest during that period. I just charged it up on my books. I did not collect \$400 a month interest on the \$20,000 note. I never got a ten-cent piece interest on that note. The check number 723, dated July 3, 1913, made by Sunset Construction Co. to A. E. Buckman was endorsed over to me by Buckman. I endorsed that check and got the money on it. It is marked, 'Paid July 21, 1913.' " Thereupon there was introduced in

evidence checks of the Sunset Construction Company, drawn on the Merchants National Bank at San Francisco, endorsed over to J. J. Rauer, and marked "Paid" by the bank, of the following numbers, dates and amounts:

Number	Date, 1913	Amount
202	May 31	\$400.
201	"	200.
212	June 2	25.
227	June 3	300.
229	June 3	200.
460	June 20	500.
461	June 13	500.
665	June 25	250.
671	June 26	450.
723	July 3	3000.
724	July 3	100.
841	July 10	100.
1030	July 23	460.
[211]		
1031	July 22	300.
1040	July 24	750.
1088	July 30	160.
1089	July 30	200.
1117	Aug. 2	3000.
1272	Aug. 6	480.
1275	Aug. 6	225.
1284	Aug. 9	500.
1304	Aug. 11	500.
1461	Aug. 21	500.
1470	Aug. 22	1154.64
1650	Sept. 10	500.

Number		Date, 1913	Amount
1791		Sept. 15	440.
1811		Sept. 17	600.
1815		Sept. 18	940.
1857		Sept. 24	525.
1865		Sept. 25	230.
2036		Oct. 7	650.
2043		Nov. 11	2000.
2244		Oct. 23	250.
2384		Oct. 27	985.
2407		Nov. 1	255.
2444		Nov. 6	1280.
2658		Dec. 15	250.
2659	1914	Jan. 16	250.
2663	1913	Nov. 18	200.
2849		Nov. 28	300.
2869		Dec. 3	350.
2877		Dec. 5	200.
3070		Dec. 13	400.
3071		Dec. 13	64.
3313		Dec. 29	34.
3527	1914	Jan. 25	400.
3706		Jan. 21	80.
3707		Jan. 21	350.
3775		Jan. 30	250.
3930		Feb. 5	395.
3987		Feb. 16	400.
4117		Feb. 19	400.
4128		Feb. 24	80.
4327		Mar. 11	250.
4337		Mar. 16	450.
4501		Mar. 24	80.

Number	Date, 1914	Amount
4506	Mar. 25	300.
4518	Mar. 30	330.
4644	Apr. 3	500.
4645	Apr. 1	15.
4655	Apr. 3	500.
4830	Apr. 16	400.
4844	Apr. 20	80.
4845	Apr. 21	400.
4970	Apr. 28	78.
5001	May 4	500.
5002	May 7	750.
5018	May 7	770.
5149	May 16	30.
5156	May 16	500.
[212]		
5167	May 20	500.
5180	May 20	130.70
5183	May 20	30.70
5507	June 11	1000.
5511	June 11	100.
5555	June 18	100.
5561	June 19	300.
5706	June 20	180.
5940	July 20	165. (N. S. F.)
5941	July 20	125.
6036	July 21	14.90
6191	Aug. 15	64.
6193	Sept. 5	400.
6290	Sept. 4	400.
6533	Sept. 15	400. (N. S. F.)
6558	Sept. 21	165.20

(Testimony of J. J. Rauer.)

Number	Date, 1914	Amount
6580	Sept. 25	230.
6588	Sept. 28	230.
6678	Oct. 1	300.
6682	Oct. 3	180.
6778	Oct. 5	3000.
6905	Oct. 17	275.
6931	Oct. 23	162.50
6932	Oct. 23	165.
7250	Nov. 21	165.
7586	Dec. 11	500.
7602	Dec. 15	525.
7609	Dec. 20	165.
7611	Dec. 21	500.
7703	Dec. 23	500.
8047	Jan. 27 1915	66.07
8271	Feb. 11	300.
8537		495.
8708	Apr. 1	450.
8716	Apr. 2	500.
8818	Apr. 6	350.

WITNESS.—“I collected the money on all those checks which are marked paid and which are endorsed over to me. The ones endorsed Rauer’s Law & Collection Co. I collected the money the same as on mine. I also collected on the ones endorsed Judas Boas. I will account for every one of the checks which you introduced in evidence. After the balance of \$20,000 was struck and the note for that amount executed to me by the Sunset Construction Company we kept our accounts by ex-

(Testimony of J. J. Rauer.)

changing checks. The \$20,000 note which was executed to me covered the same indebtedness as the \$15,000 note executed to me theretofore and endorsed by Wm. H. Chapman, but the security on the notes was different. I did not [213] cancel the first note when I got the second note because I didn't want to lose the security I had on the first note.

Q. Why was it you took that note executed by A. E. Buckman instead of having it executed by the Sunset Construction Company?

A. There was really no reason for it. He was really the whole shooting match.

That note was executed by A. E. Buckman, not by the Sunset Construction Co. Later I got the two notes secured by chattel mortgage, one for \$10,000, the other for \$5,000. I took assignments of accounts due the Sunset Construction Co. from A. E. Buckman right along. I took all the security that I could get. I never kept any record of the securities which I received. I received the \$4,273.93 listed by me on page 6 of the list of credits in my account, Exhibit 1, under the heading "28th Avenue between J. and K. Sts." Those accounts were assigned to me as security and I collected them. I haven't got that assignment. The Sunset Construction Company also assigned to me the collections due them on the Hittell contract. The chattel mortgage I have referred to was executed to H. Wehrle, but it was mine. Wehrle took it as my trustee. At the time I took that mortgage I held

(Testimony of J. J. Rauer.)

a great many unpaid checks executed to me by the Sunset Construction Co. The checks were not cancelled when I took the notes secured by that mortgage. The \$15,000 secured by the chattel mortgage were notes covering the same indebtedness as that represented by the \$20,000 note executed to me by A. E. Buckman. I took as security the 15 lots, the stock, and the chattel mortgage. The lots were security for the promissory note of \$15,000 executed to me by Wm. H. Chapman, the note of A. E. Buckman for \$20,000 executed to me in January, 1914, was secured by an assignment of stock, and the two notes aggregating \$15,000 executed to me by the Sunset Construction Co. were secured by a chattel mortgage. I brought an action in the Superior Court of San Francisco to [214] foreclose that chattel mortgage. The defendants gave me a voluntary appearance in the action. It is stipulated that the action was filed June 22, 1916, that the defendants in the action gave a voluntary appearance on the following day, and that on June 24, 1916, a decree was entered in the action by the consent of the parties." Thereupon there was introduced in evidence the decree referred to, being in an action in said Superior Court brought by H. Wehrle, Plaintiff, vs. J. McCoy, A. E. Buckman, and A. J. Meadows, as Trustees for the Sunset Construction Co., and the stockholders thereof, being action No. 74,716, reading in part as follows:

"On the 16th day of June, 1914, at said City and County of San Francisco, the defendant,

Sunset Construction Company, made and executed its certain promissory note in writing for the sum of \$5,000 for value received therefor, in favor of H. Wehrle plaintiff above named, as set forth in plaintiff's complaint, and, on said 16th day of June, 1914, said Sunset Construction Company, to secure the payment of said promissory note, executed and delivered to said plaintiff, its certain chattel mortgage in the words and figures set forth in plaintiff's complaint. That thereafter and on the 18th day of June, 1914, said Sunset Construction Company made and executed its certain promissory note in writing to plaintiff, H. Wehrle, for the sum of \$10,000 for value received, as set forth in plaintiff's complaint.

On the aforesaid two promissory notes there is now due and payable from the Sunset Construction Company to plaintiff the sum of \$10,000 and the personal property mentioned and secured by said chattel mortgage is now of the value of \$7,500.

That since the commencement of the above-entitled action defendants have delivered to plaintiff the possession of the following described personal property mentioned and secured by said chattel mortgage * * *

3 hay wagons, 3 stick wagons, 7 self-dumping carts, 2 buggies, 1 manure wagon, 1 dump cart, Q cart, 10 four-horse Fresno scrapers, 6 wheel scrapers, 3 two-horse Fresno scrapers, 1 two-horse roller, 4 sand machines, two 20 H. P.

(Testimony of J. J. Rauer.)

motors, one 30 horse-power motor, one 5 H. P. motor, 71 iron Koppel cars, 24 wooden cars, 519 sections (15 foot) Koppel track, 7780 feet 9-switch Koppel track, 3 plows, 4 plow chains, 11 sets 3 up lead bars, 26 sets 2 up lead bars, 9 car chains, 2 drill presses, 3 vises, 1 pipe cutter, 3 pipe wrenches, 1 bellows, 1 blower, 4000 feet electric wire, 1 range and camp outfit, crockery, utensils, etc., 2 horses, [215] 4 sets double harness, 3 sets single harness, drills, 1100 feet pipe, tools, instruments, buildings, etc.”

WITNESS.—“To the best of my knowledge and belief the account which I have filed here contains an absolutely full record of all moneys which I have received from the Sunset Construction Company or from any other person on their account. The property described in that decree was the same property afterwards sold in bankruptcy of A. E. Buckman. Buckman and I agreed upon the valuation of that property at \$7,500. I bid \$3,700 for the property in bankruptcy that is, Mr. Miller bid it in for me, as my trustee. I still have checks of the Sunset Construction Company executed to me that have never been paid. I took them to witness the amount of money which they owe me. When they got money from me they gave me a check to witness the amount. I held the check until there was money in the bank to pay it and some of these checks have never been paid. I made charges against the Sunset Construction Company in my

(Testimony of J. J. Rauer.)

books until this balance of \$20,000 was struck and after that I took checks when they borrowed money and held the checks to witness the amount that I loaned them. These checks were exchanged as they made payments on account, but I always held checks to show the balance due me. I hold the following unpaid checks against the Sunset Construction Company.

Number	Date, 1914	Amount.
4179	May 20	8,260.
6285	Aug. 22	500.
6301	Aug. 27	1,000.
6777	Oct. 5	1,310.
6885	Oct. 14	750.
6886	Oct. 13	800.
7213	Nov. 12	1,000.
7229	Nov. 16	750.
7592	Dec. 11	500.
7924	Jan. 11 1915	2,714.95
7938	Jan. 19	2,000.
8355	Feb. 16	1,000.
[216]		

Also the following issued after the date of the bankruptcy of A. E. Buckman.

8555	Mar. 15 1915	644.59
8671	Mar. 23	495.
8888	Apr. 9	500.
9019	May 1	650.
	May 15	896.40

The document which you show me is a petition to sell personal property entitled in this action

(Testimony of J. J. Rauer.)

and produced from the files of the clerk of this court. That document is signed by me and I swore to it before a notary public. In that petition I state as follows:

‘Petitioner represents that on the 9th day of March, 1911, he loaned the Sunset Construction Company \$500, and thereafter loaned the said company various sums of money at different times, aggregating on the 15th day of March, 1915, the sum of \$105,615.84 upon which there has been paid back to the petitioner the sum of \$76,741.02 leaving a balance of \$28,874.82; that all of said sum is secured by the chattel mortgage hereinafter mentioned.’

I stated an account with A. E. Buckman about March 15, 1915. I did not go over the account personally but I gave the data to Mr. Clark and Mr. Anthony and they made it up. The books show what the Sunset Construction Company owes me. Mr. Anthony got the data from my books. I can get all that data in 24 hours. The figures showing that the Sunset Construction Company paid me \$76,741.02 were secured from my books I think. The document which you now show me is an affidavit signed and verified by me before a notary public, and filed in this action, and in it I state as follows:

‘That affiant has loaned money to the Sunset Construction Company from time to time commencing with the 9th day of March, 1911, and the amounts thereof aggregated on the 15th

(Testimony of J. J. Rauer.)

day of March, 1915, according to an account stated on that date, the sum of \$105,615.84 upon which there has been paid back to affiant, up to that said last date, the sum of \$76,741.02, leaving a balance due of \$28,874.82.'

I swore to that statement. Mr. Anthony sat down with me and we [217] went through the books and got what the total was and upon that information I made that statement. I must have looked over the account and found that to be the amount of the debits and the credits. I can probably get the statement that that was based upon. I didn't have an account stated with Buckman on March 15, 1915, but I meant, by my affidavit that he owed me that amount on that date. I got that sum from my books. The account is right here in my ledger; that is the book I got it from. That is the only account I have. After March 15, 1915, I made some of the collections from the Sunset Construction Company. I would collect the money and deposit it to my account in the bank and then give the company proper credit.

Q. Is there any explanation which you want to make why the amount that you have credited in the account to Sunset Construction Co. is some \$16,000 less than the amount that you have stated in your affidavit was paid to the Sunset Construction Co. prior to March 15, 1915?

A. I will have to run over the statement and see.

The MASTER.—The point is you file an account with no vouchers at all. I presume that if I had examined this carefully I would have thrown this

account out in the first place. Your vouchers should have been in.

Thereupon there was introduced in evidence the ledger of J. J. Rauer, showing the account between him and the Sunset Construction Company, a true copy of which ledger account follows herein:

Page 235.

1911		1911	
Mar. 9	Loan	Mar. 21	To its a/c
May 17	J. A. Miller	May 17	"
18	To its a/c	July 10	"
June 12	Loan	22	"
27	Loan	Oct. 2	"
July 11	Loan	25	"
27	"	Nov. 10	"
Aug. 22	"	10	"
28	"	Jan. 18, '12	"
Sep. 21	"	25	
Oct. 17	"		
Nov. 1	"		
10	" Chapman		
13	"		
Nov. 15	Loan		

\$ 500.
 400.
 2650.
 1000.
 500.
 3000.
 1000.
 1000.
 640.
 640.
 640.
 1000.
 4000.
 2037.50

1912		1912	
Jan. 9	Ck.	1000.00	
9	"	1000.00	
19	"	1500.00	
19	Interest	45.00	
19	Discount	600.00	
20	Int. 15 M 2/18/12	225.00	
23	Loan	1500.00	
26	"	1250.00	
Feb. 1	"	730.00	
			To balance 15,000.
		26432.50	
	Balance forward	15000.	
	Page 204.		
1912		1912	
Feb. 1	To balance	15000.	May 6 To its a/c 6,734.16
Apr. 11	Rec. deed Joseph to Chapman		
11	" Clark	1.70	7 " 172.50
		1.70	25 Gillett Mtg. 500.
May 7	Ch. Curran	215.	25 Bal. 15 M note 8000 661.74

9	Ck. 2/26/12	400.	July 31	To its a/c	1250.
21	Int. to 5/18/12 15000.	450.	Aug. 31	"	1650.
25	Loan	2000.	31	"	350.
June 17		1075.	Oct. 18	"	250.
July 15		1715.	21		1715.
29		1250.	21		2000.
Aug. 10		1650.	22		1000.
13		350.	26		450.
Oct. 14		1000.	Nov. 4		25.
14		1000.	4		2000.
17		252.	11		1000.
21		2000.	24	Profit & Ls.	2.
23		2450.			
26	Adv. Panama	25.			
28	Loan	1650.			
Nov. 11	"	2600.			
19	"	350.	24	By Balance	15625.00
					<hr/>
					35385.40

1911	Balance				15625.	
Nov. 25	Loan		Nov. 29	To its ac.	1250.	10.00
27	"		29		765.	750.
29	Jk. screw etc.		Dec. 2		7.50	5.
Dec. 6	Loan		9		520.	500.
14	"		13		3700.	2500.
14	Ret. Ck. Panama		14		2500.	2600.
Jan. 27	'13 Loan		14		2100.	1250.
Feb. 8	Int. 15175		14		339.	350.
8	Loan		14		2075.	7.50
8	"		Jan. 14, 1913		1025.	1200.
			Feb. 14	To balance		20734.
					<hr/>	<hr/>
					29906.50	29906.50

[219]

June 1	700.	June 2	300.
3	300.		
July 10	600.		
<hr/>			
	29421.	" 15 Int.	
July 15 Int.	90.	July 30 Cash	300.
30 Ck.	160.	30	1500.
	200.	Aug. 1	480.
City Hall	1440.	1	160.
		Sept. 5	200.
Sept. 5 Automobile	525.	"	960.
Horse	90.	25 Horse	90.
City Loan	1980.	Oct. 14	525.
Nov. 10 Dempsey	22.	Nov. 10	1980.
		10 Balance	1500.
			13906.
<hr/>			
	33928.		

	100.	"	100.
	180.	"	180.
	1025.	Cash	1025.
Recording	1.90		1.90
Notary fees	3.		3.
Mtg.	10.		10.
Jack	12.	July 20 Payable	12.

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[220]		
1914		
July 15	Loan	20000.
May 15		896.40
May 20		8260.
Aug. 22		500.
Aug. 27		1000.
Oct. 5		1310.
13		800.
14		750.
Dec. 11		1000.
11		500.

16		750.		
Jan. 11	1915	2714.95		
19		2000.		
Feb. 16		1000.		
Mar. 15		644.59		
23		495.		
Apr. 9		500.		
May 1		650.		
Apr. 19		1000.		
Aug. 12		350.		
	A. J. Meadows	10.	can.	
	Rent to Oct. 1	300.		
Dec. 26	Sale of personal property set aside	7500.	can.	Dec. 10 Credit 10,000.
				July 3, 1916 Sale Per. Prop. 7,500.
Aug. 12	1916 Jordan hay bill	205.	can.	Dowling etc. 7,139.63 Unpaid Ass. 21 & 22 & B. 1,145.18 Anthony 125. Jordan hay bill 205.
				10. " [221] Meadows

Testimony of Fillmore Buckman, for Defendant.

FILLMORE BUCKMAN testified that he was the Secretary of the Sunset Construction Company,—kept its books; that on December 12, 1913, when the \$20,000 note was given to J. J. Rauer, an entry was made in the books of the Sunset Construction Company as follows:

“Balance due J. J. Rauer to this date, \$20,000.00—All other moneys due J. J. Rauer covered by checks and orders”

“That this latter entry referred to two checks, one for \$8,260.00—one for \$3,000.00 which are not included in the \$20,000.00 note.”

“It is stipulated by counsel that the checks introduced in evidence while Mr. Rauer was testifying show payments of interest by the Sunset Construction Company to J. J. Rauer, aggregating \$6,619. We kept a book which we called a ‘Black Book’ and in that I made entries showing the transactions between Rauer and the company. Many times we would issue checks to cover loans received from Rauer and when we came to pay the money back we would not have the exact amount shown on the face of the checks he held. So he would exchange the checks he held for new ones representing the difference between what we paid and the former balance due him. The checks he held were supposed to represent the amounts he had loaned to us. All the entries made by me in the Black Book were transactions of which I had personal knowledge and are correct entries. The first entry in the Black

(Testimony of Fillmore Buckman.)

possession witnessing the same indebtedness as that covered by the note. I don't know of any reason why he got duplicate acknowledgments of the same indebtedness except that he wanted to secure himself. Rauer took assignments of all the contracts on which he was advancing money to the company and we furnished him with statements of the company's affairs. The two notes referred to in the entry in the Black Book dated May 20, 1914, were respectively, one for 2200 dated April 29, 1914, and one for 1900 dated May 20, 1914. The check for \$3,960 there referred to was executed after the time when the \$20,000 note was made. By comparing the two entries in the Black Book dated Dec. 12, 1913, and May 20, 1914, respectively, I concluded that the full amount of the indebtedness due to Rauer on Dec. 12, 1913, was represented [223] by the note for \$20,000 and the two checks issued prior to the date of that note and aggregating \$3,200. I knew from day to day what checks were outstanding and in Rauer's possession. I got the data from my check stubs. I opened up a ledger account with J. J. Rauer in the books of the Sunset Construction Co. on July 31, 1913, and continued it, on the debit side until December 26, 1914. I personally banked practically all moneys received from Rauer and issued all checks for the company so I had personal knowledge of pretty nearly all the transactions had between them. The ledger account is not correct because I didn't know all the transactions. I sought to keep the ledger account to the best of my knowledge and ability. The ledger sheet shows a

(Testimony of Fillmore Buckman.)

balance due to Rauer on December 26, 1913, of \$21,490. The checks which we gave Rauer to hold were taken up regardless of their date or the order in which they were issued. The checks cancelled were those which happened to coincide with the amounts of money which we had available for payments. Rauer kept a list of the checks but the only list he could keep would be one which would show a great many paid checks along with those that happened to be unpaid. We kept no separate account of transactions with Boas in our ledger."

"I drew most of the checks of the Sunset Construction Company and signed them and kept the checks in numerical order, and whenever a check was issued I got a return on it; and I always knew what checks Mr. Rauer held."

Whenever the Sunset Construction Co. was prepared to take up a check it would simply pay Mr. Rauer the amount of money that it had available for that use, and in that manner would take up checks which he held aggregating the same amount. There is no way of telling which checks were held for a long time, or which checks were held for a short time. These checks that were delivered up and cancelled were those that happened to coincide [224] with the amount that the Sunset Construction Company had available for that payment.

Mr. Rauer kept a list of all the checks and whenever we paid a check, or had enough money to pay any part of the checks, we would probably get that check out of that list and take that up regardless of the date.

(Testimony of Fillmore Buckman.)

I do not think that Mr. Rauer knew how I kept the accounts or anything about what my entries were. I never charged the interest up until the check was actually taken up. We very seldom actually checked up. Of course, Mr. Rauer knew in an offhand manner. He would say, "Well, I see the account has gotten up to \$20,000.00 or \$34,000.00." Of course, mine would tally nearly with the amount, with the exception Mr. Rauer's would naturally show some interest, because he would charge up the interest. I never charged up the interest until the check was taken up.

I knew just what he had all the time because they checked off with the bank.

Assignments were made to J. J. Rauer of all contracts of the Sunset Construction Company whenever he would lend any money on them, or advance any money for the bank.

The directors of the first Sunset Construction Company which was dissolved in the month of December, 1911, and succeeded by the new Sunset Construction Company, were Mr. Chapman, Mr. Mowry, Mr. A. E. Buckman, and F. P. Buckman.

Q. You would call at Mr. Rauer's office and spend considerable time there?

A. I would go there whenever I wanted to get some money, I would go there early in the morning, and I would have to wait until he came—after he came I would have to wait. I would want [225] a certain amount of money, and I would have to go back in the afternoon again, and he would tell me he

(Testimony of Fillmore Buckman.)

expected to get some money in—I would have to wait around. That is how a great deal of my time was spent—waiting for money. That was the only business that I would transact with Mr. Rauer.

Mr. Rauer never attended any meetings of the Sunset Construction Company that I knew of. The meetings of the directors of the Sunset Construction Company were always held over in Mr. Chapman's office in the Foxcroft Building.

The contracts would be bid on data made up by Mr. Buckman for the Sunset Construction Co.—Mr. Buckman did all the figuring. Mr. Rauer had nothing to do with the matters. The only contracts Mr. Rauer would know of ahead of time would be if there was a job being bid on, and we would go over and get a certified check from him. Most of the jobs required certified checks, and it was seldom that the Company was in a position or had a balance that would handle it, and we would get a certified check from Mr. Rauer for the amount required.

Mr. Rauer never regulated the expenses of the Sunset Construction Co. The first time that Rauer knew anything about that was at the time that Mr. Buckman's account was brought up before the bankruptcy court. I remember that when the statement was read off, and Mr. Rauer came out to one of the sessions there, that he was alarmed about the amount that Mr. Buckman was getting. Mr. Buckman was allowed a salary of \$150.00 per month, and he was drawing all the way from \$500.00 to \$800.00 a month from the Company, and the rest would be

(Testimony of Fillmore Buckman.)

charged against him for expenses—and a great portion of this would be used for expenses.

Mr. Rauer commenced paying all the bills of the Sunset Construction Company on its contracts on March 20, 1915.

The account of Mr. Rauer shows certain items collected [226] by him after the date of Buckman's bankruptcy, February 19, 1915, which were for work done before that time. I believe that the Iverson collection of \$500.00 was one of those. I kept a little grey book which shows the amount of unpaid checks outstanding at any one time. This book shows that the amount of checks held out on February 17, to 24, 1915, was \$29,027.15."

Testimony of J. J. Rauer, for Defendants (Recalled).

J. J. RAUER further testified:

Mr. Fillmore Buckman would come down and say—"Can I get some money for the pay-roll or something," and I would say, "I have not got it—if you go down to Mr. Boas, I will see if I can get it." We would go down to Mr. Boas, and Mr. Boas would then say, "Allright." Mr. Fillmore Buckman would say, "It is five minutes to 12:00," and I would go down to the bank and hand him the money. Quite often this was the way these checks were drawn. I had an arrangement with Boas that he would get 1½%, but he takes no responsibility. If I lose I have to make good. I took the Sunset

(Testimony of J. J. Rauer.)

Construction Company check, and he charged the amount against my account.

In a great many cases it was necessary to have the money within an hour or two for the pay-roll. They did not want their bank to know that the Company was borrowing money from me at $1\frac{1}{2}\%$; they had no credit. A great many merchants borrow from me, and they do not want their bank to know where they get the money from.

I severed my connections with Graf and with the Rauer Law and Collection Agency on May 13, 1913, and had no further dealings with them, or either of them, after that. I have not been in that office since four times within five years.

After March 1915, I made some of the collections and the Sunset Construction Company made some. I cannot tell which ones they collected, but the moneys on account of these contracts [227] of the Sunset Construction Company which had been assigned to me, and which I was carrying out, and which I collected, I would deposit in my own account but give proper credit to the Sunset Construction Company on my books. I do not think I collected anything on any contract that I did not have a proper assignment of.

I never went over the books of the Sunset Construction Company and I never attended any meetings of the Sunset Construction Company. They would come over to me and want money, and I would ask them what they were doing, and they would show me that they had a job for so much, and

(Testimony of J. J. Rauer.)

on the strength of that I would give them more money.

I never knew what salary Mr. A. E. Buckman received. The first time I learned what Mr. Buckman was drawing from the Company was when I was sitting in the bankruptcy court, and Mr. Fillmore Buckman testified to it.

The rates of interest between me and the Sunset Construction Company were by agreement between Mr. Buckman and me. Mr. Buckman showed me the resolution of the Sunset Construction Company authorizing him to transact all business for the Company.

The minute books of the Sunset Construction Company were introduced in evidence and showed the existence of such resolution.

Testimony of W. H. Chapman, for Plaintiff.

W. H. CHAPMAN testified in substance as follows:

That he has been a director and president of the Sunset Construction Company since its inception, and also has been its attorney; that he had many dealings with the Sunset Construction Company where it would borrow money from him, and he would take its check for the money and hold this check for a few days—sometimes hold it for quite a while. [228]

When the first Sunset Construction Company forfeited its charter, the business and assets of that

(Testimony of W. H. Chapman.)

company were all transferred to the new by the directors of the old company, and the directors of the old company were to receive the stock of the new company as trustees for the old corporation. The stock certificates in the new corporation were never as a matter of fact issued. They were filled out and made ready for signature by the Secretary, but they were never signed. Then the new company went ahead with the business as though nothing had happened, without completing the transfer of the stock to the old corporation, and then the directors of the new company went along with the business of the new corporation.

Of the new company the first three certificates—50 shares each, were issued to the incorporators. Certificate No. 4, dated December 15, 1911, is for 10,000 shares drawn in favor of W. H. Chapman, A. E. Buckman and J. Maury, trustees of the Sunset Construction Company, the defunct corporation. That certificate was never signed by the secretary, nor had it the seal affixed. It was just kept in the books, and nothing further was done with it. The directors of the new corporation were the same as the directors of the old corporation.

The Master then made the following statement:

The question is whether the second Construction Company ever legally became a corporation. Undoubtedly it acted as a corporation; but if it was not a corporation the trustees were still continuing in the business; there would have to be either in terms or by implication of law, an assignment by

(Testimony of W. H. Chapman.)

the second corporation of the debts of the first in order to carry over those debts whether the books show them or not. [229]

Testimony of A. E. Buckman, for Defendants.

A. E. BUCKMAN, called as a witness for the defendants, testified, in substance, as follows:

I think there were writings transferring the assets and obligations of the first Sunset Construction Company to the second Sunset Construction Company.

After I filed my petition in bankruptcy the corporation went right along doing business.

All the money that we got from Boas Mr. Rauer procured for us and stood good for,—Boas getting 1½% and Rauer getting the other ½%.

Mr. Rauer had no supervision whatsoever over the affairs of the Sunset Construction Company. The only business he had with it was to loan money and finance us.

Sometimes Fillmore Buckman would go around with Mr. Rauer and get the money from Boas, and sometimes I would.

During the latter part Fillmore Buckman would attend to all of that matter with Mr. Rauer.

I would not discuss our business affairs with Rauer except to say, "I am going to bid on a job," and would want a check for probably so much. I had it figured out generally.

We would furnish Mr. Rauer with rough estimates of contracts on hand, uncompleted contracts,

(Testimony of A. E. Buckman.)

etc., to give him some idea of how things were going, but we would not do this very often.

The company was never declared a bankrupt—only I personally.

I think roughly estimating it the company owed Rauer \$40,000 at the time of my adjudication in bankruptcy. This was represented by notes and checks.

A. E. BUCKMAN. (Continuing.) At the time the order was given by the Court, I took Mr. Phillips and Mr. Laine and his bookkeeper down to the office at 62 Post Street, and I said, "Here [230] are the papers belonging to the Sunset Construction Company, there are some other papers, my own personal papers." We had an office next door, and I suggested that we get that office. I was on Market Street, the door was open, and some fellow came running up and said, "Somebody is over in your office tearing it to pieces and taking things out." I went back, and they said, "We will take everything before we get through." I went over and got Chapman, and Chapman went over and says, "What are you trying to do here?" They said, "We got an order to take these things out of here." Chapman took their word, and they took all these papers, and my own personal papers, and papers belonging to Peters—they took them all away, including contracts, checks and everything. They were all mixed up; it would take a month to segregate the work in such shape as we had it before.

Testimony of Benj. Boas, for Defendants.

BENJ. BOAS, called as a witness for defendants, testified, in substance, as follows:

I loaned money to the Sunset Construction Company, but these loans were all through Mr. Rauer. Mr. Rauer stood back of them. They were charged to him in my ledger cards. Mr. Rauer by his signature guaranteed the payment of all those loans in every case.

Testimony of W. A. Clark, for Defendants.

W. A. CLARK, called as a witness for defendants, testified in substance as follows:

I did not prepare any of the records in Rauer's books or in the books of the Sunset Construction Co. and am not personally familiar with any of the transactions witnessed by them. I went through the records and checked them up. I did not keep the original pay-roll books, and the transactions recorded therein occurred long before I was employed by [231] Mr. Rauer. The only knowledge I have of the matter is from reading the data on the cards.

I am a bookkeeper for Mr. Rauer. I also work for D. F. Cramer. The assignment of the Hittell contract was made December 14, 1914 to Mr. Rauer. The work was done in 1915. The first payment on that job was on May 22, 1915.

Mr. WILLIAMS.—We have no interest in it at all if it was done subsequent to Buckman's bankruptcy.

(Testimony of W. A. Clark.)

The 45th Avenue between A. and B. Streets was a contract that was signed after the bankruptcy. The moneys on this were all collected after Buckman's bankruptcy.

The Hartley, Carolin, Phelps, Reis and Van Clausen contracts were also either performed or partly performed and collected after Buckman's bankruptcy.

The first credit on the Carolan contract was Sept. 1, 1914. The first money Mr. Rauer advanced on that contract was the pay-roll of \$889.25 of May 15, 1915; and on May 22, \$723.35, and the next \$1287.90. Altogether Mr. Rauer has paid out on this contract \$4,469.69 and received \$4,422.64.

The advances made by Mr. Rauer on the Hittell contract commenced February 25, 1915, and ran up to the end of April. The first work done on that job was February 19, 1915. Mr. Rauer paid all the pay-roll of the Hittell job and handled that job.

On March 31st there was a contract for paving to Moran for 14th Ave. between A. B. and C. On April 16, 1915 a permit issued for the intersection of 14th Ave. between A. B. and C.

Mr. CLARK.—I told you I would agree upon your figures.

The MASTER.—I said the other day that this first amended account, since it was in the nature of a correction might be put in as an appendix to the argument, but I think I will let it go in now. I will give it an exhibit number. I don't know the next number in order, but I will call it defendants' Exhibit No. 3." [232]

**Testimony of Fillmore Buckman, for Plaintiff
(Recalled).**

Mr. FILLMORE BUCKMAN, recalled, testified in substance as follows:

The cash-book entry shows that on May 14, 1915, a check for \$1043.36 was received from Sol. Getz & Son, and turned over to Mr. Rauer. He paid us back \$889.25."

I went over the bill ledger of the Sunset Construction Company to see whether Mr. Rauer's account as to the jobs that were unfinished February 19, 1915, or were done after that date, was correct. And so far as I can state that supplemental statement of Mr. Rauer is a correct compilation.

I am familiar with the Academy of Science job. The work was done but a balance was retained by the Academy until we did certain back filling which couldn't be done until the building was completed. It cost about 500 to do this back filling. The Academy had retained a balance of \$300 which it paid to us when the work was done. We had a second job after that for the Academy which was done by the day, at so much a day. The pay-roll vouchers produced by Mr. Clark were for the day work done on the second job and were not for the work done under contract for which the balance of some \$300 was due to us. The money balance due on the contract job was received by Mr. Rauer.

The 14th Avenue contract was a contract in two portions—two contracts; one was for grading and sewerage—grading and paving. The grading and

(Testimony of Fillmore Buckman.)

paving was done by the Sunset Construction Company and collected for by it. Then it went on and there was another contract with Ned Moran for the construction of the sewer on that street after we completed the grading. Moran came along and put in his sewer and later on the paving and curbing had to go in there. That contract at that time was taken over by Mr. Rauer; he had all the collecting. This contract does not appear in the books of the Sunset Construction Company. This paving was done long after June, 1915. [233]

All the work that was being carried on prior to July first I handled the collections myself with the exception of those contracts Mr. Rauer had in his hands; and then even so, those jobs were collected by me and turned over; but the 14th Avenue paving had not been started when I was there. The grading on 14th Avenue which was that because that was prior to that I attended to all the collecting of that. There were at least two or three months as near as I can figure between grading and paving. The bills for the grading were gotten out on 14th Avenue contract along in April, 1914, and ran into February, 1915. Mr. Rauer had nothing to do with that; none other than the City's portion which we assigned to him. When the City's portion was due, of course that ran into 1915, but the bills were assigned to Mr. Rauer and collected by us; that is the 14th Avenue bill. The Sunset Construction Company had nothing to do with the paving part of 14th Avenue job between A. B. and C.; that was completed in May, 1915. I think Mr. Rauer made

(Testimony of Fillmore Buckman.)

a contract with the Federal Construction Company to do the paving on it. He sublet the work to it. He sublet the work for the grading and the balance of the paving and collected for that. It was along in May Mr. Rauer began to take over these contracts. There is nothing in our books as to this 14th Avenue paving contract. There is a voucher in our books No. 2342, dated May 10, 1915, of Henry Meyer for constructing granite curb and paving between A. B. and C. a total of \$784.70. I do not know whether that was made out before or after the work was done. Lots of these bills were made out long before the bills were due. I do not know why we sent out voucher 2365 for \$750 on May 10, 1915, for this work. That voucher is a carbon copy of the bill that we sent out. The item of March 24, 1915, 14th Avenue paving \$560 and the item of the same date \$743.04 represents the Federal Construction Company's bill for paving 14th Avenue. [234] There is no payment on that bill. It was just a bill. In the ledger under the caption, Examinations, is an item marked 'February 11, 1915, 14th & B., \$8.' That would show that some part of the work on 14th & B. Sts. was completed before that date. The ledger also shows a payment to E. C. Moran on account of paving contract, 14th Avenue of \$350 on January 16, 1915."

The entries showing the payments to the Federal Construction Company of the items of \$560 and \$743.04 show that the paving contract was com-

(Testimony of Fillmore Buckman.)

pleted at least as early as March 24, 1915, on 14th Avenue.

With reference to those items appearing on page 3 of the credit side of Mr. Rauer's original account, I remember one time in checking some of those items, as being collections of sums which were assets of the Sunset Construction Co. as of date prior to February 19, 1915, but at the time I was checking them, it was only from memory, that was as I could remember, whether they belonged to that statement or not. The only ones that I checked out were those that I was pretty certain of at the time that those belonged in there. That first item, July 6th, Reeder & Foster, \$407.20—I checked off that first item, I think as being an item which was an asset of the Sunset Construction Co. prior to the date of this bankruptcy. And that is true about the item under date of January 15, 1916, order of Bosworth, \$500.

I have been over this statement, and am familiar with the items there, and the items designated by the name of Federal Construction Company and Dowling. I would know where my ledger account is, showing the dates on which these items were collected, if they come in at the time I was keeping the books, I would have something in the ledger there. I would not say that these items collected from Dowling and the Federal Construction Company were not applicable in time prior to the [235] bankruptcy, on February 19, 1915, because we were dealing with Dowling and the Federal Construction

(Testimony of Fillmore Buckman.)

Company even after I had left the company, I know. We were dealing with them continuously.

Mr. Williams here offered in evidence that portion of a petition for leave to foreclose chattel mortgage entitled in the above-entitled court in the matter of A. E. Buckman, Bankrupt, and sworn to by J. J. Rauer on the 13th day of November, 1916, which reads as follows:

“Petitioner, J. J. Rauer, represents that on the 9th day of March, 1911, he loaned to the Sunset Construction Company the sum of \$500 and thereafter loaned various sums of money at different times aggregating upon the 15th day of March, 1915, the sum of \$105,615.84 upon which there has been paid back to petitioner J. J. Rauer, the sum of \$76,641.02, leaving a balance due of \$28,874.82; that all of this sum is secured by chattel mortgage hereinabove mentioned.

Said petition further avers that the chattel mortgage referred to was executed June 16, 1914.”

(Applicant has not made a part of this statement the various checks and books and documents introduced in evidence as vouchers for or in question of the account of J. J. Rauer for the reason applicant does not question in his exceptions the deductions made by the Master on account of interest and discount and on account of one duplication of an item; but appellant has necessarily confined this statement or bill of exceptions to those matters that relate to the exceptions specified by him.)

(Testimony of Fillmore Buckman.)

(Neither has there been incorporated in this bill of exceptions or statement the exceptions made and filed to the report of the Master, and which were subsequently passed upon [236] by the Master, as the exceptions not allowed by the Master were subsequently incorporated in the exceptions to the Master's report which were presented to the District Court upon objection to confirmation of said report and which form a portion of the record on appeal.)

Testimony of J. J. Rauer, for Defendants (Recalled).

J. J. RAUER, recalled: "In getting up the petitions which I verified and which were filed in this action, I think I gave my books to you, Mr. Anthony, and you added and subtracted and reached a lump sum. I think my checks were in evidence in this court at the time and that I did not have them on hand. I never stated in my affidavit that on the 15th day of March, 1915, I had an account stated with Mr. Buckman. I know what an account stated is.

“Exhibit 1, introduced in evidence, being Statement of Account of J. J. Rauer with Sunset Construction Company, reads in part, as follows:

Exhibit No. 1.

CREDITS, GENERAL ACCOUNT.

1915

July	6	Reeder & Foster	407.20
		McNeil	10.
	9	F. J. Gallagher	200.00
	14	F. J. Gallagher	190.
	14	F. J. Gallagher	267.50

Settle-
ment

31	J. E. Phillips 27 & K	600.
31	Rolandi	2.25

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1915

Sept.	31	English	14.15
	“	Robbin	18.30
	“	G. Mateo	1.50
	“	A. Frank	2.25
		T. Veralda	1.25
	5	Vogt & Foster	1,227.50
	6	L. G. Roberts	34.29
	7	E. Chun, check	1.65
	9	Reece, old claim T. St.	150.
	“	Dowling	200.
	12	Geissler	81.25
		J. P. Holland	208.15
	19	T. Dowling	600.

Sept. 22	Tucker	95.
Oct. 4	Reeder & Vogt	13.25
1	Jack Dowling	50.
"	Scrap Iron	75.
28	Rear Teaming	5.50
"	Foster & Vogt	91.48
Nov. 6	Jack Dowling	125.
20	Federal Construction Co.	150.
Dec. 6	Foster & Vogt	55.12
	Federal Const. Co. ..	80.
	Federal Const. Co. ..	174.
	Wood for Cement ..	78.74
	Warren, San Anselmo	5.
	McGuffugan	11.50
	D. F. Cramer	136.37
	Dr. O. M. Jones	100.
	Federal Construction	250.
30	Blanchard & Brown..	32.
31	E. K. Wood	29.39
Nov. 30	Dowling	200.
1916		
Jan. 15	Order of Bosworth ..	500.
17	Fay Improvement Co.	183.40
21	Fay Improvement Co.	26.75
22	Federal Const. Co. ..	300.
27	Blacksmith	5.
Feb. 1	Teaming	73.
"	Harris	60.
"	Telephone	7.50
"	Water	10.
"	Rent	25.
8	Blacksmith	5.

Aprl.	5	Dowling	250.
"		Dr. Joy (Dowling) ..	317.12
	10	Harris	60.
		Telephone	7.50
		Water	9.80
		Rent	25.
		Hutton job	29.
May	3	Cramer machine	169.50
		Harris	60.
		Water	10.
		Rent	25.
		Telephone	7.50
		W. Nunes	7.
		Hauser	6.

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1916

May	5	Walsh	7.50
		Alischer	5.
	23	J. W. Wright (Dowling)	178.75
	10	Hutton Sand Machine	212.50
		Hutton Sand Machine	212.50
		Harris	60.
		Rent	25.
		Telephone	7.50
		Water	10.
		Watchman	7.50
	27	Hutton Sand Machine	152.

	30	Water	10.
		Telephone	8.90
		Watchman	7.50
		Harris	60.
June	30	Rent	25.
	"	Cramer Blacksmith..	96.80
July	20	Burns	18.
		Fordeso	1.25
		Farcello	7.25
	29	Hilton	5.
	"	Souza	24.
Aug.	1	Harris	60.
	"	Rent	25.
	"	Telephone	8.90
	"	Water	10.
	"	Blacksmith	82.25
	14	Sand Machine Hut- ton	350.
Oct.	20	Morgan Imp. Co. ...	76.82
Nov.	16	Morgan Imp. Co.	82.31
1915			
Oct.	28	Lipman	62.50
Nov.	6	J. W. Wright	125.
		Hirschler	50.
		Board of Trade (Gra- ding)	193.22
		J. W. Wright	95.
		D. E. Perry	22.50
		Mrs. Griffith	5.
	24	Gadisk	20.
		M. Newman	30.

1916

Feb.	2	Clark job	45.90	
	10	Teaming & Grading..	10.	
May	22	Ducas	55.65	
	"	Thompson, Hauling Dirt	32.50	
July	3	Ducas	50.	
Aug.	12	J. Dowling	8,409.80	

1915

Dec.	3	H. A. Moore	100.	
Feb.	11	City & County Hos- pital	250.	
Mch.	9	Harroway	10.	
Dec.	4	Neil Thomas	39.	
		Heyman City Imp. Co.	370.	
		Iverson	500.	
Mch.	25	Heyman & Co. (22 & L. lots)	4,000.	

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Apr.	10	Joseph Estate	1,100.	
		O. Heyman	48.72	
Dec.	7	15 lots @ \$1000, 15,000. Sub. to Mort- gage	9,000. 6,000.	

Credits

HITTELL CONTRACT, 22d Ave. bet.
H. & I.

1915

July	19	a/c	1,318.11	
	"	a/c	4,140.34	5,521.45

Credits

ACADEMY OF SCIENCE
CONTRACT.

1915

Aug. 31 a/c 225.

Oct. 1 - 75.

1916

Jan. 18 200. 500.

Credits

14th Ave. bet. A. B. and
C. Sts., Contract.

1915

Weinstein Bros. 137.50

Cora Rive 267.21

W. B. Ryder 306.70

Cora Rive. 55.

J. H. Babbitt 300.91

O. Heyman & Bro. ... 750.

J. F. Corkery 50.

J. Maloney 250.

1916

Jan. 6 Chas. Katz 100.

E. E. Jordan 83.65

Chas. Lathrop 145.

J. H. Babbitt 65.60

1915

July 6 J. Turey 30.25

W. F. Gardenus 160.

C. R. Russell 195.

Sept. 16 Anna Solari 148.81

Heyman 250.

	Dufour	20.	
	H. Meyer	1,398.04	
	S. Meyer	1,750.	
	Getz	521.83	
July 26	Dufour	10.	
Aug. 22	Dufour	10.	
1916			
Jan. 3	S. Meyer	487.60	
26	Katz, Bal.	67.50	
6	Getz & Son	500.	
HYMAN JOB, 14th & B.			
1915			
Nov. 6	a/c	300.	
13		300.	
23		200.	
Dec. 24		400.	
31		200.	
1916			
Jan. 8		200.	
[240]			
1916			
Jan. 14		500.	
15		1,200.	11,340.
.			

Proceeds of sale of Chattel Mort-
 gage now in hands of Referee,

\$ 3,706. "

Testimony of Oscar Heyman.

OSCAR HEYMAN, testified in substance, as follows:

We entered into a contract with the Sunset Construction Company on outside Lands Block 297, 14th Ave. between Anza and Balboa called Grading Account No. 2. On Nov. 6, 1915, we paid the Sunset Construction Company \$300; on Nov. 13, 1915, \$300; on Nov. 24, 1915, \$200.00; Dec. 23, 1915, \$400.00; Dec. 31, 1915, \$225; On January 8, 1916, \$200.00; on January 12th, we paid J. J. Rauer \$500.00 on instructions from Buckman or Sunset; February 29, 1916, we paid the Sunset Construction Company \$1,200 by way of a lot located in Outside Lands Block 409—that is Cabrillo and 34th Avenue. This lot was taken by the Sunset Construction Co. in part payment for the work done on 14th Avenue—the deed was made to W. H. Chapman at the request of the Sunset Construction Co. We made this deed under proper instructions, because we would not put ourselves liable to Mr. Rauer or to Mr. Buckman without it.

As far as I remember there were assignments from Buckman to Rauer in various cases, and I know he always appeared in many of the transactions.

The \$500 payment to Rauer on January 12, 1916, was made by virtue of an assignment to him from the Sunset and was on the same account as the \$1,200 lot. At the time that lot was deeded to

(Testimony of Oscar Heyman.)

Chapman I knew that Rauer held an assignment of this account.

On May 21st, I paid \$750 and on May 24th, I paid \$250.00 to Rauer and the Sunset Construction. In addition to that we paid for curbing—that did not enter into this contract. Those payments were on the 14th Avenue contract. Then on June 8, 1915, I paid Rauer and Sunset \$500. The payments in May and June, 1915, were on account of the 14th Ave. contract.

There was another contract with Moran, and a contract [241] with a man by the name of Graham for some curbing. On the same contract for grading there, for the corner, we paid April 23, 1915, Sunset Construction Co. \$250.00; April 28th, \$200.00; and April 30th, \$200.00. They were simply charged to the Sunset Construction Company and applied to the corner 100 x 102, 14th Ave. and Balboa.

Now he did some work for us on Outside Land Block 406, on 26th Ave., between Fulton and Cabrillo. He graded 22d Ave. for us from Lincoln Way to Irving Street. We settled with him on March 31, 1916, and the job was commenced easily a year before that. We conveyed two lots to Mr. Rauer at an agreed valuation of \$4,000 in payment.

The amounts I have read out as being paid for work on 14th Ave. are for the grading work, the paving is not entered in this account. The paving contracts were entered into with the City Street Improvement Co. and the Federal Construction

(Testimony of Oscar Heyman.)

Co. The items I have here are simply grading accounts which we entered into with the Sunset.

The MASTER.—It is perfectly clear that it is all grading. He so stated in his testimony this morning.

The WITNESS.—It is all grading.

Q. Now, on this sheet marked "Street Work," you will notice an item May 21, and another item May 24, to J. J. Rauer. A. Yes.

Q. One item \$750 and the other \$250. Now, those items were paid to Mr. Rauer? A. Yes.

Q. On those dates?

A. Yes; that is our check register.

Q. They have no reference to this grading work, have they? A. No.

Q. That was for some other work?

A. We entered into a contract for paving and sewerage and curbing of 14th Avenue; that is represented here in this. [242]

Q. That would be this separate sheet here?

A. Yes.

Q. So that you would change your testimony of this morning in that respect? A. Yes.

The MASTER.—This separate sheet here means nothing in the record.

Mr. ANTHONY.—I am referring here by "this separate sheet," to the sheet taken from the ledger account of Mr. Heyman pertaining to Outside Land Block 297 and marked "Street Work Account," and there is a reference on this in writing, Moran and Sunset Construction Company.

(Testimony of Oscar Heyman.)

A. Yes.

Q. That would refer to a separate contract, would it?

A. Moran had the original contract for that work.

The receipt in evidence which is dated June 8, 1915, for \$500, is signed by J. J. Rauer. It is signed A. E. Buckman per J. J. Rauer. Mr. Rauer used to come in for money independent of Buckman and when he came in for money he had to receipt for it. Probably he signed for it when he received it. When he came in for money Buckman did not sign for him. The statements I show you are true transcripts of our ledger pages and contain a true statement of the moneys paid by us and the accounts upon which it was paid. Thereupon four ledger sheets were admitted in evidence, one of which is in the words and figures following:

“NAME: O. L. 297. St. Work a/c.

DOCUMENT: Moran & Sunset Const. Co. Charges.
1915

May 21	To J. J. Rauer & Sunset.....	750.
24	“ “	250.
June 1	Edw. C. Moran sewer.....	100.
8	J. J. Rauer & Sunset.....	500.
15	Edw. C. Moran.....	130.
July 30	H. Graham & Sunset.....	200.
Aug. 21	H. Graham acct.....	100.
Sept. 30	“ in full	200.
Oct. 4	“	179.03

[243]

(Testimony of Oscar Heyman.)

The ledger sheets entitled 'O. L. Grading acct. #2 "and" O. L. 297 Grading a/c Sunset, Corner 100 x102' refer to the grading of the lots and not the grading of the street.

There was a payment made to Edward C. Moran on account of Sewer \$100.00, June 18th, and an item to J. J. Rauer and Sunset \$500.00, and an item of \$200.00 to Graham for curbing on July 30. All this was in 1915.

We originally had a contract with Moran for paving and sewerage. He had nothing to do with the grading at all. The contract was at 22d and Lincoln Way. The ledger sheet marked "O. L. 297, St. Work," embodied grading of street, sewerage, bituminizing and curbing. That was the street on 14th Avenue. Moran did the paving and sewerage, not the grading.

I have one original bill that I have located, and it says: "Oscar Heyman & Bro. to Sunset Construction Co., April 28, 1915, to grading your property fronting 100 feet on B. St. and 102 ft. on 14th Avenue, as per contract dated April 19, 1915, \$953.00." Then there was due \$100.00, and there was a balance of \$853.00. Then he received \$250.00, and shows on it "credit by cash May 1, 1915, and May 8th." That includes the grading of lot.

The sheet O. L. 297, Street Work Account, includes the paving. The contract was with the Sunset Construction as far as our direct dealings went. Moran was the sewer contractor. Graham laid the granite curb. The items of Rauer and Sunset in-

(Testimony of Oscar Heyman.)

clude the paving and the grading of the street. My account states "14th Avenue and B. Grading," dated April 23, 1915.

I have another one from Graham on account of Sunset Construction Co. and J. J. Rauer assignment of money owing on street work, 14th Avenue and Anza—that is H. Graham. I have also on account of Sunset Construction Co. and J. J. Rauer, assignment of money owing on street work, 14th Avenue between Balboa [244] and Anza, dated August 21, 1915—payment of \$200.00 on account of grading lot 14th Avenue, Nov. 1915. November again, grading lot 14th Ave. on account of 14th Ave. grading, signed J. J. Rauer.

The only moneys which I paid to Rauer were under assignments made to him by the Sunset Construction Co. Our ledger sheet entitled O. L. 406 shows that we paid the Sunset Construction Co. \$300 on Jan 6, 1915, and \$200.00 on Jan. 23, 1915. I have a receipt where which shows that this money was paid for work done on 14th Ave. After I was notified of the assignments to Rauer I made no payments without knowing that Rauer was in a position to control the collection of the money if he desired to do so.

J. J. Rauer's journal introduced in evidence shows the following entries with reference to 14th Avenue collections:

	Charge for Curbing and Paving	Amt. Received by Mr. Rauer or others	Balance Collected and retained by Sunset	Excess over payment Bills Collected by Rauer
Webb	\$166.25	\$137.50	28.75	
Ryder	319.20	306.70	12.50	
Reva	322.21	322.21		
Babbitt	366.51	366.51		
Maloney	319.20	250.00	69.20	
Katz	207.80	167.50	40.30	
Jordan	157.50	83.65	73.85	
Lathrop	198.75	145.00	53.75	
Gardius	215.93	160.00	55.93	
Solari	198.75	148.81	49.94	
Getz & Son....	1,043.36	1,043.35		
M. Baker	210.00)	(1,179.00	Graham	
Hyman.....	1,969.00)	(1,000.00	Rauer	
Dufour	40.00	40.00		
Henry Meyer).				
S. Meyer	2,328.52	3,148.04		819.52
C. R. Russell...	196.00	195.00	1.00	
Tarpey	336.00	30.25	305.75	
Corking	198.75	30.00	168.75	
	<hr/>	<hr/>	<hr/>	<hr/>
	8,793.73	8,763.53	859.72	
	7,853.53		819.52	
	<hr/>		<hr/>	

Loss to Mr.

Rauer \$40.20 \$40.20

The Sunset Construction Company's books further show the [245] following entries:

“Feb. 24, 1915, Received from J. J. Rauer,
check\$245.
Discount on note..... 5.

\$250.

Assigned to J. J. Rauer note Ryder on 14th
Avenue\$250.”

Said books, being entries made in the ‘Black
Book’ show the following:

Mar. 10, 1915, Rec. from City a/c 14 & B.....	495.	
Cash paid over to J. J. Rauer.		
Mar. 12, 1915, Pd. J. J. Rauer City bill 14 & B cash.	495.	
" " Ck, Scott, P. P. I. E. Co.....	535.	
Morrigan Coll. cash	35	1065.
Taken up in exchange.		
Ck. 5720	510.	
" 8386	200.	
" 7936	155.	
Pd. Hall Electric in full.....	102.94	
Int. Ck. 5720.....	90.90	
"	24.	
Rider note.....	10.	
Int. on.....	3.	
Ck. J. J. Rauer.....	75.	1170.84
Diff.		105.84

Apr. 16, 1915.

Pd. J. J. Rauer Ck. Golden Gate
Park, on Clay.....

1290.

May 22, 1915.

Paid J. J. Rauer, Ck. Sol. Getz a/c
14th Ave.....

1043.36

May 25, 1915, Pd. J. J. Rauer Ck. B. Dufau..... 20.

“ “ “ “ Ryder..... 306.70

“ “ “ “ Meyer..... 3148.04

3474.74

S. C. Co. Ck. taken up 6245..... 1000.

6190..... 1000.

8256..... 330.50

5759..... 500.

Int. 3394.30

80.44

June 3, 1915, Pd. J. J. Rauer, Ck. Rec. Sol Getz		
a/c 14th Ave.	521.38	
" " E. E. Jordan.....	83.75	
" " Gardese	160.00	
Due from J. J. R. on 2/25/15.....	33.34	798.47
<hr/>		
Ck. S. C. Co. taken up		
8260.....		
8357.....	800.	800.
<hr/>		
		1.53

There was admitted in evidence the following statement of the account between

Buckman and Rauer:

Sand Machine Account.

1916			1916	
May	1	Patent Rts.	Sept. 10, Hutton	200.
		Bldg. Meh.	Oct. 14, "	400.
June	5	E. A. Hall	Nov. 10, "	400.
July	6	"	Dec. 9, "	300.
Dec.	15	Track & Cars	1917	
1918			Sept. 28, Rock	105.40
Jan.	1	Interest 1%	1918	
			Jan. 1, Int. 1%	175.45
Jan.	22,	a/c Mach. F. N.	Balance	5032.85
July	1,	Int. 1%	Jan. 22, F. Nelson	666.40
			June 14, O. McHugh	150.
			July 1, Int. 1%	36.25
			Balance	6420.17
				7272.82
July	1,	Balance		7272.82

There was admitted in evidence certified copies of resolutions passed by the Board of Public Works of the city and County of San Francisco, showing that the work of the Sunset Construction Co. for grading public streets was accepted as follows:

14th Avenue, C. to F. Streets	Accepted	May 13, 1914.
14th Ave. C. to B.	“ “	May 13, 1914.
14th Ave. A. to B.	“ “	Jan. 22, 1915.
14th Ave. Crossing B. Street	“	Feb. 19, 1915.

Defendant Rauer's check stub #8631 introduced in evidence shows that this check was dated February 27, 1915, and made to [247] Sunset Construction Company and paid it on that date.

That cash book of Sunset Construction Company, pages 30 and 31, entries for July, 1915, shows the following items:

On debit side of cash book entry showing cash receipt by Sunset Construction Co. as follows:

Foster & Vogt (another name for Reeder

& Foster), in full for Jan. team hire.. \$907.20

On credit side of cash book, entry showing payments by Sunset Construction Co. as follows:

Stock hire, D. F. Cramer, a/c Foster & Vogt order.....	500.00
Sunset Const. Co.	
J. J. Rauer from Heyman.....	95.00
J. J. Rauer from Heyman.....	370.00
J. J. Rauer from Foster & Vogt.....	407.20

**Testimony of Fillmore Buckman, for Plaintiff
(Recalled).**

FILLMORE BUCKMAN, recalled, testified, in substance, as follows:

The Sunset Construction Company and D. F. Cramer, on account of team hire, got a sum, and on January 11, 1915, this was settled by Mr. Rauer taking over the account and paying it in the sum of \$2248.50. Mr. Rauer has never repaid that sum. Mr. Rauer carried us for that. The little black book of the Sunset Construction Company introduced in evidence contains a correct statement of the facts in every instance. The entries were made from my personal knowledge at the time they occurred.

The first pay-roll on the Carolan job that Mr. Rauer was interested in was a pay-roll that we did not have sufficient money to pay off with and for the money from Mr. Rauer for each man so much on account of his time during that month. Then, later on, we paid off the balance of that pay-roll, and the following month, Mr. Rauer's check—that was the first pay-roll where Mr. Rauer drew his own personal check for each man. But the one prior to that he gave a lump sum to cover the amount that we paid.

In reference to the entry May 14, 1915, Sol Getz & Son check for \$1,043.36 on the Hittell contract, I have gone over the cards from the 19th of February, 1915, up to the time the job was completed. The stock hire account will amount to

(Testimony of Fillmore Buckman.)

\$8,000 or \$9,000. Mr. Rauer was paying the hire account bills.

I have taken the foreman's report and made up the number of horses that were used, and taken it at the rate of \$1.50 in order to find out what must have been the cost of the stock on this job. I have also got the vouchers on that to prove that there was \$8,000 for stable expenses for stock hire, horse shoes and that kind of stuff. [249]

Those vouchers cover payments beginning from June up to December, 1915—that was five months—of course, there are other jobs that come in.

The 28th Ave. contract, between I. and J., Mr. Rauer had the assignment prior to the date of the bankruptcy; in fact, we were signing the contract up at the time, but the work was done after that. It belonged in there. The first work that was done on this job was July 12, 1915.

The McNutt contract was dated along in 1912 and was assigned to Mr. Rauer. I do not know just the date of the assignment. The contracts are not filed until the permit is granted by the Board of Public Works, and the parties to the contract cannot go upon the public streets and commence to do the work until that permit is granted.

As to the Academy of Science contract. The payroll starts on July 1, 1915, and ends on the 21st. It was a short job. There are the original cards. These checks are mixed up with the H. and J. job and 22d and Lincoln Way. These are the original time cards.

(Testimony of Fillmore Buckman.)

Q. I will ask you if there is not a \$200 credit in the original account showing that the total amount received on the Academy of Sciences contract was \$500 instead of \$300, as you make it appear in this amended statement.

A. On page 8 on January, 1916, there is a credit of \$200, but that had nothing to do with the contract at all, so they told me. I know nothing about it; it had no bearing on it at all.

The date of the permit, 28th Avenue, Irving and Judah Streets, was granted on May 5th, 1915, that was the date of the first permit.

Payment for getting these signatures to these contracts is made whenever the signature is obtained. On this particular job, there are two signatures that we could not get; in fact, I could not get them. Mr. Joe McHugh went out and got the two signatures, and Mr. Rauer paid him. [250]

I am familiar with the Academy of Science contract. The Sunset Construction Company had a contract with the Academy of Sciences for doing certain work around the Museum out there, and that was completed with the exception of certain back-filling that was to be done after the building was completed. When the time came to complete the contract it cost a great deal more to complete it than the balance retained by the Academy of Sciences. Later on, we had to go back and do that work. Then there was a balance, I believe it was \$300 odd, due the Sunset Construction Company on the contract. After that there was some work done for

(Testimony of Fillmore Buckman.)

the Academy of Sciences, but it was day work; it was not contract work; it was hauling around the building there, it was so much a load. In the general statement there are two items, Academy of Sciences balance of \$300, and then there is this other amount for \$200. In looking that up, I find that was for hauling that was done there by the day.

On the ledger here, the item, July 21st, 1915, \$352, is for work done by the day; they were hauling material in and around the building. The balance on the contract is \$300 and some odd dollars. The cards that Mr. Clark has were the vouchers to sustain this \$352 item which was day work, July 21, 1915. The cards show that. These cards were for that \$352 item, which represents the day work done on that job. I cannot say, right offhand whether it is correct or not.

This money was received by Mr. Rauer, according to his statement, and was a balance on this contract work which was done before the day work was commenced. There is no question about that.
[251]

Testimony of J. McCoy.

J. McCOY testified in substance as follows:

I have been working for the Sunset Construction Co. continuously for 28 years and up to March, 1919, and my occupation was manager of teaming, grading and construction work, and for 10 years I was Buckman's superintendent of machinery and equipment. The equipment consisted, principally,

(Testimony of J. McCoy.)

of scrapers, plows, sand machines, cars and tracks. On the T. Street job they used from 2 or 3 scrapers, up to 8 or 10 at different times, 5 or 6 blocks of track—these blocks were 240 feet to the block, about 25 cars and one sand machine. This equipment was used during the whole time the job was in progress. The rental value was 25 cents a day for the scrapers and 25 cents a day for the cars. The sand machine was a conveyer with an endless chain on it used for loading cars. The T. street job started before any wiring was done by the Pacific Gas & Electric Co.

A man named Hutton used two trains of about six cars each per day; and also a sand machine and track. This same equipment was used on the job on 28th Avenue between J. and K. Streets—also on the same avenue—29th Avenue between I. and J. Streets; also on the Richmond side, 28th Avenue between J. and K. Streets. There were about 18 cars in regular use, and some extra for emergencies; there was also used one sand machine and about two blocks of track.

On the Hittell job, 22d and Lincoln Way, there were 21 cars in actual use and three or four extra cars, the sand machine and quite a string of track there. This work was done along Lincoln Way, down along Golden Gate Park from 22d to 36th—about 14 blocks, 3000 feet, and about a mile of track was used.

None of this equipment was scrapped or sold during the time [252] that he was foreman. The sand machine was hired by McHugh, for which he

(Testimony of J. McCoy.)

paid a rental of \$150.00 a month. The Morgan Improvement Company had a few cars—three or four cars, and a couple of hundred feet of track.

In the equipment altogether, there were four sand machines, 60 cars, about a mile of track, 7 or 8 scrapers.

One sand machine was used on the Fernando Nelson job, about 25 cars and about a mile of track.

It appears from the books and accounts introduced in evidence that the jobs and their duration on which J. J. Rauer used any of the equipment mortgaged to him by the Sunset Construction Company were the following:

T. Street job—April 11, 1916, to July 24, 1916, 3½ months.

Testimony of Thomas W. Simmie.

THOMAS W. SIMMIE in substance testified as follows:

That he had been employed in looking after the Sunset Construction Company jobs, and some time actually as foreman; that the Sunset Construction Company owned three sand machines, and Buckman owned one; there were about 60 iron Koppel cars, and quite a number of wooden cars, and a little more than a mile of track. This equipment is the very equipment that was made the subject of the sale in bankruptcy.

The wooden cars and some track were not used on a job on San Buno Avenue being conducted by the Federal Construction Co. There were no streets

(Testimony of Thomas W. Simmie.)

near it at that time—the nearest street [253] was Oakdale Avenue. It was used on the West side of Oakdale Avenue—they worked on both sides of Oakdale Avenue.

My experience as to rental value of this equipment is—that I was in conjunction with the rental of a machine on Fulton Street. Mr. Buckman rented one to a man that fell down on it, and he took it over himself, and I ran that machine with Mr. Buckman afterwards, and I know that Mr. Buckman was getting \$150.00 for the rental of these sand machines. I personally had charge of the machines on different occasions and personally rented some of the machines. The rental value of the machines was \$150 a month. On the Nelson Track Koppel cars were being rented for \$5.00 a month a car, and 3 cents a foot for the track by Buckman's concern. I was then in Buckman's employ and knew what the Koppel cars were rented for also the track. I have here the verified claim of J. J. Rauer, against the Buckman Estate and that claim shows that the wiring done by the Pacific Gas & Electric Company, on the T. Street job was done on March 20, 1916, and that the certificate of completion shows that the job was completed on December 13, 1916.

I saw some of this equipment in use on the two jobs on 28th Avenue, one between J. and K. Sts., and the other between I. and J. Streets, and I saw some of this equipment in use on the Hittell job, 22d and Lincoln Way a great many times. McHugh only

(Testimony of S. P. Doyle.)

took the shovel alone, or the same machine alone—no track or equipment. He paid \$150.00 a month rental.

It was thereupon admitted by counsel for J. J. Rauer that the amounts shown by J. J. Rauer's account in evidence to have been collected from 'Hutton' were paid for use of the equipment referred to in the above testimony." [254]

Testimony of S. P. Doyle.

S. P. DOYLE, Cashier of the Federal Construction Company, testified in substance as follows:

I have been cashier of the Federal Construction Co. for 10 years and was in that position when a job was done by that Company on San Bruno Ave. near Oakdale Ave. The Federal Construction Co. made certain payments to J. J. Rauer after that job was completed. I have here duplicate checks issued to Rauer and Buckman or Rauer and Sunset Construction Co. Some of the checks were paid to the Sunset Construction Co.; some to J. J. Rauer as assignee of the Sunset Construction Co. and A. E. Buckman; and some were paid on orders given on us by those persons. The payments all got into one account, that is paying bills for rental of wagons, and rail, cars, and in settlement of his *pro rata* share of the job on Balboa St., 21st Ave., and this San Bruno job. The statement shows that we paid the following amounts which are listed on our ledger sheet:

1915.

Nov. 20	Cash to S. C. Co.....	150.	
30	Cash to S. C. Co.....	200.	
Dec. 9	Cash to Harvey Graham, order S. C. Co.....	254.	
22	Cash to S. C. Co.....	250.	
31	Rent for cars, Carolina St. ....	..	210.

1916.

Jan. 22	Cash to S. C. Co.....	300..	
Apr. 8	Cash to S. C. Co. & J. J. Rauer	250.	
19	Bill assigned to S. C. Co. Joy's 21st Ave.....	317.12	
14	Cash to J. F. Dowling & Co.	275.02	
	Note: Amt. to be charged to S. S. Co., J. J. Rauer		
May 4	Cash to S. C. Co.....	100.	
23	Acct. against H. M. An- thony, Foerster St. as- signed to them.....	125.08	
23	Acct. against Joseph Est., 21st Ave.....	1305.52	
18	Cash to A. E. Buckman..	60..	
Aug. 12	Cash in full to J. J. Rauer of all accts.....	7139.62	
Sept. 12	Cash to A. E. Buckman..	10.	
29	<i>Pro rata</i> share collecting Bannock Ass.....	10.	
29	Amt. collected by Rauer from Seashore Realty..	544.50	

1916.

Sept. 29	<i>Pro rata</i> share loss 21st Ave., 40%	227.81
29	<i>Pro rata</i> share profit B. Street, 40%	491.60
29	Allowance Joseph Est. orig. chg. \$1305.52, collected \$1100 diff.....	205.5
29	<i>Pro rata</i> share profit San Bruno, 50%	9858.1

[255]

Sept. 29	Order given to A. Young & Buckman & chg. Buckman account.....	205.20
29	Team hire etc. 20th & Wisconsin, San Bruno, 14th, 19th, Irving St., Forest Hill, 21st & B., 15th Ave.....	5190.5
29	Allowance made to Buckman	188.6
29	Allowance made to Buckman	91.4
29	Allowance made to settle: Total Allow.....	1396.66
	Prev. Ent.....	203.07
		1193.5

1917.

Apr. 14	Cash J. J. Rauer.....	292.05
30	Jos. Dillon acct. assigned to S. C. Co. & J. J. Rauer	287.75
30	Diff. on acct.....	20.88

(Testimony of S. P. Doyle.)

The check of Aug. 12 for \$7,139.62 covered payment in full to date for team hire, rental of cars and all other charges, and for the *pro rata* share of the profits accruing from the following contracts: San Bruno Ave., 21st Avenue and Balboa or "B" Street. I was present at the negotiations that preceded the payment of that check and knew that some money had been held up by Mr. Rauer on a notice to withhold. This was money due the Federal Construction Co. from the city of San Francisco. The check for \$7139.62 was paid by us to J. J. Rauer coincident with the release of that notice to withhold. At that time there was a conversation at which there was present Messrs. Anthony, Buckman, Rauer, Dowling, Hanrahan and myself. Mr. Hanrahan is secretary of the Federal Construction Co., and Mr. Dowling is president. At that conversation there was a general summary made of the account and it was closed. I have a copy of that summary which is taken from the ledger sheets of the Federal Construction Co. That was used as a basis of our settlement. These are our original book entries. The ledger sheets and the journal entries. Thereupon the ledger sheets and journal sheets were received in evidence. The ledger sheet contained all the data heretofore read into evidence by the witness, and in addition thereto, the following: [256]

1915.

Apr. 24 Improving 14th Ave. as
per contract.....5760.

24 Improving Lot on Irving
St. 258.38

1915.

Apr. 30	Paid for examination 14th Ave.	48.
May 24	Improving 14th Ave. crossing per contract...	783.04
31	Misc. pay-roll expense....	6.10
June 30	Misc. pay-roll expense....	2.10
June 30	Misc. pay-roll expense....	5.10
July 14	Inspection fees 14th Ave. contract	6.

 6875.82

12	by cash (Paid by J. J. Rauer)	2000.
June 7	To 4 bbls. Cement (for sewer C. St.).....	10.20
July 31	Misc. pay-roll expense...	4.35
31	Misc. pay-roll expense....	.90
Oct. 1	100 brick taken by Buckman	1.40
23	Rent 3 wagons @ \$15 per mo.	146.30
25	Black powder to McCoy..	26.70
26	Sharpening drill points..	.40
Nov. 20	Purchase from Dunham, Carrigan & Hayden ...	3.82

1916

June 9	Sharpening drill points 20th & Carolina	24.80
July 29	Ass. J. W. Wright & Co. Balboa St. Collect. by J. J. Rauer.....	180.

 7274.69

Journal entries on Sheets admitted
in evidence.

Sept. 29, 1916.

Sunset Construction

Co. 544.50

Accts. Payable 544.50

Accts. receivable

544.50

Seashore Realty

Co. 544.50

This amt. collected by

J. J. Rauer. He is entitled to same for reason that like amt. of money was held out when we made settlement with him in full on Aug. 12, 1916. This is a part of the \$1,145.18 the total amt. held out of this payment.

Contracts San Fran-

cisco 9858.11

As per agreement Sun.

Const. Co. shares $\frac{1}{2}$ of profit on San Bruno job.

Suspense Acct. 5190.45

Items noted below are charge of S. C. Co. for team hire. These items have previously been charged through pay-roll acct. but checks held until such time as we could make settlement with

these people. As said
above amts. chgd. to con-
tracts; we are therefor
chg'g cks. deposited in
favor of S. C. Co.

20th & Wisconsin.. 811.15

San Bruno Ave....1044.05

14th Ave. 12.50

19th Ave. 622.10

[257]

Irving St. 24.

Forest Hill 32.

21st Ave. & B St. ..2069.65

15th Ave. 568.

Suspense Acct. 188.60

Items noted below allowed

S. C. Co. when settlement
made of their acct.

Inspection fee 14th

Ave. 30.

Inspection fee Fin-

negan 85.60

Line & Grd Nelson 35.

All. Irving St. con-

tract 40.

Contracts San Fran-

cisco 91.40

Items noted below allowed

S. C. Co. when settlement
was made.

Hauling cars & track to

(Testimony of S. P. Doyle.)

Wisconsin St. ...	72.
Helpers two way...	12.
Rope, powder & caps	7.40
Contracts San Fran-	
cisco	1193.59

Balance due S. C. Co. previous to settlement was 7103.34. When settling this acct. J. A. Dowling allowed him an add. 1396.66 to make a total credits amounting to \$8500. We cannot show this add. credit on our books as part of it has already been entered but which was questioned (210) when getting ready to make final settlement. This amt. of 1396.66 also contain chg. of 210, which has already been credited. We also allowed them 6.93 for extra team which added to 1396.66 after deducting 210 leaves the above amt. See papers on file.

I am familiar with the arrangements that were made between the Federal Construction Co. and Buckman about the division of the profits on the San Bruno job. The understanding at and before the contract was awarded to us was, if we got the contract, Buckman was to be on the job every day and have full charge and see that it was run properly and was to supply all equipment, and the Federal Construction Co. was to supply all the money. The profits were to be divided 50-50. The Federal was to bid on the job and finance it and Buckman was to furnish the equipment and superintendence, and profits were to be divided equally. The profits on that job came to \$19,716.22. That is double the amount [258] shown in the ledger of \$9858.11. On the 21st Ave. and Balboa St. job we had an

(Testimony of S. P. Doyle.)

arrangement for the division of the profits whereby we got 60% and Buckman got 40%. We were to finance the jobs and furnish materials. He was to furnish equipment and superintendence. On the 21st Ave. job there was a loss and he stood \$227.81, and on the B. Street job his share of the profits was \$491.60. On the San Bruno job we actually paid Buckman 50% of the net profits realized. Where I have spoken in my testimony of checks being made to J. J. Rauer as assignee of the Sunset Construction Co. and A. E. Buckman, I mean that Rauer was the sole payee of the check. Rauer was the assignee of the Sunset Construction Co. and we added Buckman as another payee with Rauer simply as a protection so as to have his signature on the check.

We made the payment of April 14, 1917, in final settlement. We had assigned some accounts to Buckman and Rauer to collect, and they failed to collect them, so they turned them back to us and we gave them our check for the difference. It was only a couple of hundred dollars. The exact description given by the Board of Public Works to the San Bruno Ave. job was 'Improvement of San Bruno Ave. from a line 835 feet northerly from Courtland Ave. to the easterly intersection of Sengen St.' "

Thereupon there were admitted in evidence the resolutions of the Board of Public Works showing the temporary acceptance of said work on January 19, 1916, and a resolution of final acceptance on May 29, 1916. Also the resolution of the Board

(Testimony of S. P. Doyle.)

awarding that contract to the Federal Construction Co. on December 21, 1914.

“The agreement for sharing profits on the job I have mentioned was merely a verbal agreement. There were some teams used on the job but they were charged to the job. They didn’t [259] figure in the settlement. We rented teams from Cramer on some of these jobs. I do not recall any transaction whereby Cramer’s bills were assigned to Rauer and paid by us to Rauer. Mr. Rauer was intimately connected with Buckman during all that time.”

Mr. Dowling personally had a claim against Mr. Rauer for the use of a lot for storing certain things on it, or some rental, at \$20 a month. It had nothing to do with the Federal Construction Company.

I am familiar with the arrangements that were made between the Federal Construction Company and Mr. Buckman, or the Sunset Construction Company, about the division of profits on the San Bruno job. The understanding was at the time the contract was awarded to us, or before, if we got the contract, that Mr. Buckman was to have full charge of the job and be on the job every day, to see that it was run properly and to supply all equipment. The Federal Construction Company was to supply all money, and the division of profit was to be made 50-50. The Federal Construction Company was to bid on the job and finance it, and Mr. Buckman

(Testimony of S. P. Doyle.)

was to furnish the equipment and superintendence, and they were to divide the profits equally. The net profits on that job came to \$19,716.22.

That is double the amount that is shown in this ledger, \$9,858.11.

On the 21st and B Street job we also had an arrangement for the division of profits.

On the 21st Avenue and Balboa Street job we were to receive 60 per cent profit and Mr. Buckman 40 per cent of the profits. We were to finance the job and furnish the materials on those two jobs. He was to superintend the job and furnish the equipment. On the 21st Avenue job there was a loss; he stood \$227.81 of the loss, and on the Balboa Street job his share [260] of the profits was \$491.60. The full profit on that particular job would be twice \$491.60. It was 40-60.

That would be different in reference to the San Bruno job, on the settlement by virtue of the compromise. We paid him half, fifty per cent.

Where I have spoken of checks being made to J. J. Rauer, assignee for Sunset Construction Company and A. E. Buckman, that means that Rauer was the sole payee of the check. We had dealings with the Sunset Construction Company, a corporation.

As to these other two jobs on Balboa and Twenty-first Avenue, I don't know whether it was the Sunset Construction Company or A. E. Buckman; A. E. Buckman was the party that was to share in the profits. We had Buckman's signature on

(Testimony of S. P. Doyle.)

the endorsement of the check. Mr. Rauer was the assignee of the Sunset Construction Company, and we joined Buckman as another payee and got his signature as a payee on our check, simply as a protection.

The Federal Construction Company did not enter into a contract with either Buckman or the Sunset Construction Company; that is, an agreement as to the sharing of the profits on the job. For instance, the Federal Construction Company and A. E. Buckman should agree and contract to do that certain work out there, we to furnish the money and he to do the work and supply the equipment, and having papers written up to that effect. No such papers were ever written up as to the profits of the job, or anything put down; it was merely a verbal agreement. When I say there was no contract, I mean there was nothing made in writing. Mr. Buckman was to do the superintendence of the job. There was an oral agreement made, but nothing was reduced to writing on the subject. And Mr. Buckman was to furnish the equipment. And, in consideration of the fact that he would furnish all the equipment to be used and superintend the job, [261] they were talking about going into a division of the profits. It was agreed before the job was started, as to the profits.

The work on the San Bruno job—conditional acceptance, it is called here,—on January 19, 1916, practically stopped at the date of the conditional

(Testimony of S. P. Doyle.)

acceptance. There was no real work done thereafter.

The final acceptance was merely held up pending certain adjustments.

The resolution of the Board of Public Works awarding the contract which shows the date of the completion of the contract to be May 29th, 1916, and date of awarding of contract to be December 21, 1914, was received in evidence.

During the performance of the contract a question arose as to Mr. Buckman's performing the agreement on his part. Our superintendent reported a number of times that Buckman was not on the job and when we complained about it to Mr. Buckman, he said, "I have other work to do." Then he promised to show up every morning, but our superintendent reported that he did not do so, and we were very much dissatisfied with the way he carried out his part of the contract. [262]

Testimony of Thos. F. Boyle.

THOS. F. BOYLE, Auditor of the city and county of San Francisco, testified as follows:

I have brought here certain papers which are in my custody as Auditor of the city and county of San Francisco. The first is a notice to withhold on the letter-head of H. M. Anthony, dated June 13, 1916, addressed to me and signed by J. J. Rauer. It is endorsed "Released 8-12-16." I also have another paper on the letter-head of H. M. Anthony, dated Aug. 12, 1916, signed by J. J.

(Testimony of Thos. F. Boyle.)

Rauer and addressed to me. Both papers were filed by me. There is also a third paper dated June 13, 1916, signed by J. J. Rauer and endorsed "Released 8-12-16." Thereupon the papers were offered and admitted in evidence. The first reads as follows:

"The undersigned, J. J. Rauer, hereby makes demand upon you that you retain out of any moneys coming from the City and County of San Francisco to the Federal Construction Co. the sum of \$12,000 due on that certain contract which said Federal Construction Co. has for the grading and sewerage of San Bruno Ave. between Oakdale Ave. and Galvin St. entered into with the Board of Public Works of said City and County of San Francisco. The claim for \$12,000 is for the hiring, rental, use and consumption of equipment and material used in the grading and sewerage of San Bruno Ave. between Oakdale Ave. and Galvin St. by the Federal Construction Co. from the Sunset Construction Co. and said Sunset Construction Co. has sold, assigned and transferred all of its claims and demand for said sum of \$12,000 against said Federal Construction Co. to the undersigned, J. J. Rauer, and the undersigned is now the owner and holder of said claim and demand.

(Signed) J. J. RAUER."

The second document reads:

“The undersigned hereby makes demand upon you that you retain out of any moneys coming from the City and County of San Francisco to the Federal Construction Co. the sum of \$1,900 out of any demands or money due the Federal Construction Co. through the department of Public Works. The claim of \$1900 is for the renting of teams and doing of grading work by the Sunset Construction Co. to the Federal Construction Co. on that certain job for the grading and sewerage of San Bruno Ave. between Oakdale Ave. and Galvin St. The said Sunset Construction Co. has sold, assigned and transferred to the undersigned J. J. Rauer, all of its claim and demand for the aforesaid hiring of teams and grading and the undersigned is now the owner and holder of said claim and demand.

(Signed) J. J. RAUER.” [263]

Both the foregoing documents are addressed to the Auditor of the city and county of San Francisco, dated June 13, 1916, and endorsed “Released 8-12-16.”

The third document is a written release of the foregoing two documents, dated August 12, 1916, and signed by J. J. Rauer. The authenticity of the signature of J. J. Rauer to each of the foregoing documents is admitted by his counsel.

Testimony of J. A. Dowling.

J. A. DOWLING, President of the Federal Construction Company, testified in substance as follows:

In the year 1914-15 we had a grading job on San Bruno Avenue. We are strictly in the paving business. This grading job came up. We presumed that Mr. Buckman from his past experience knew a great deal about the grading business, so we called him in and talked to him about the job. We were to go in the job together. He was to supply the equipment and his personal supervision, and we were to supply the money and bid the job out in our name, and we bid the job out and got it. We had a verbal agreement with A. E. Buckman that we broke 50-50 if any money was to be made; if any money was to be lost, we were to stand it.

At the time of the settlement of the work, the controversy that had arisen between us and A. E. Buckman was that A. E. Buckman never supplied any material or any equipment, and very little of his services, and we did not figure that he was entitled to participate in any profits that might be made on the job.

There had been written agreements to be signed; he presented them to us to sign, but we did not sign them. After we had signed up on the work we made absolutely no written agreement of any interest to A. E. Buckman. We made a settlement with [264] J. J. Rauer. Mr. Rauer brought in an assignment by Buckman of any interest he

(Testimony of J. A. Dowling.)

might have in the work; Rauer and Buckman were both present at the time of the settlement.

The controversy between Mr. Buckman and ourselves was that we didn't figure that Mr. Buckman was entitled to any share of the profits, and we came to an adjustment and paid, I think it was \$7,000, or something in that neighborhood, to settle the matter up—to Mr. Rauer.

It was not 50 per cent. We charged everything against it that we thought proper to charge against it, and then that was kind of an upset settlement; it was not any certain percentage of the job at all. The considerations that were taken into account in arriving at this settlement with Mr. Buckman were that Mr. Buckman had gone out there many times, and—Mr. Buckman presented himself every morning on the job and tried to hold his claim down. When we started the job originally, he started to do a little work around there, and we assumed he knew what he was doing. We found that very shortly afterwards he did not, and we put our own superintendent out on the job ourselves to run the work, a man who was supervising the rest of our work in San Francisco; but Buckman, to hold his claim down, I guess, presented himself every morning on the job, and I suppose to give some color to his claim; we didn't want any lawsuits or any bother about the matter, and we came to a settlement and paid the money to Mr. Rauer on Mr. Buckman's assignment.

(Testimony of J. A. Dowling.)

The Journal entry, dated September 29, 1916, is made on a second item of an allowance, and it says:

“Under orders from J. A. Dowling an additional \$1,396 was allowed Mr. Buckman in order to make up the amount which he claimed and which was in excess of the amount the Federal allowed on their books.” [265]

The City Engineer, in making the estimate—it was at the crossing of San Bruno and Crescent Avenues, it was a sink, soft ground; when he filled that in, the sink went down and we had to put in more dirt than the cross-section showed, and we had an extra claim before the City Engineer for the extra dirt, which was afterwards allowed, after that adjustment had been made, and we allowed him a portion of that. That is where the additional amount comes in.

We released the money to pay Rauer on the San Bruno job settlement when Rauer released the stay notice which he had filed with the Auditor. The ledger and journal entries of the Federal Construction Company contain a correct statement of the accounts between our company and Rauer and the Sunset. The entry in the journal *re* credit of \$1,193.59 was a credit allowed an outgrowth of the original San Bruno Avenue contract on an extra which we got doing work in the sink.

We also had an agreement on the 21st Avenue job with Mr. Buckman and he was to share 40% of either the profits or the losses. And our books

(Testimony of J. A Dowling.)

show that in that case that his *pro rata* of loss was \$227.81, with which you charged him.

And on B Street we also had an agreement on that job, in which he was to take 50 per cent of the profits or the losses. And in that case our books show that we gave him credit for \$491.50, his *pro rata* of the profits.

In calculating those things we calculated them in accordance with the terms of the original agreement. The agreement with Buckman was a separate and distinct agreement. On the 21st Avenue and on the B Street work, we absolutely had nothing to do with it at all, he attended to the entire work himself; we merely paid his pay-roll for him. The agreement provided we should get 60 per cent of the profits or of the losses for financing the job; [266] we absolutely had nothing to do with the job at all. He supplied the equipment and did all the work.

On the San Bruno Avenue job we did not follow out the original agreement, because he did not follow out his original agreement. He represented to us that he had a lot of cars and track and equipment, and he had the equipment to do the job with, and when he came to the job he had no equipment at all. He did eventually put a few cars on the job, very few. Yes, and a very short amount of track; we had to get a steam shovel and put it in there; we bought it from Crocker & Howe, who had the Twin Peaks Tunnel job.

(Testimony of J. A. Dowling.)

And the \$1,198 we gave him credit for, we gave him credit because we were obligated to do so under the original agreement. We felt we were kind of obligated in a way; he presented himself every morning, and we figured that if he sued us that probably after a lot of bother we would have to pay, and we paid him to get rid of it. We did so because of the original contract that we entered into with him, and for no other reason; because Buckman did not live up to his contract anywhere along the line. We paid him to avoid trouble; that is the only reason. His claim was founded on the original agreement he had with us to divide the profits 50-50; and payment was made because of that agreement, and in consequence of that agreement; that was the basis for it. There were other considerations, such as adjustments with the City Engineer's office on the main job. They made up an estimate of the amount of work that had been done, but in that estimate they did not allow for the extra material we put in for the sink that had sunk down; that is where the extra amount comes in afterwards. He figured with some adjustment with the Crocker people on the Twin Peaks material. That was a part of the consideration for his services in making an advantageous settlement. [267]

Testimony of Mr. Rauer, for Defendants (Recalled).

Mr. RAUER, recalled, testified as follows:

I received the \$7,139.62 entered on my ledger as a credit to the Sunset Construction Co. following July 3, 1916, and described as "Dowling" from the Federal Construction Co. The credit of \$125 is a sewer bill which Anthony owed to the Sunset, and I simply paid his bill and deducted the amount from what I owed him for attorney's fees. The item of credit for \$1145.18 marked "Unpaid Assessment 21, 22 & B," is for bills which were assigned to me by the Federal Construction Co. and I went out and collected them.

I received from Hutton as rent on a sand machine, \$200 on August 15, 1916; \$400 from September 1st to October 1st; \$400 from October 1st to November 1st; \$300 from November 1st to December 1st; and then after 1917, there are some other items. Altogether I received from Hutton \$1300, for rent during the period mentioned. My account shows the following receipts for the use of this equipment in 1916, to wit:

May 10, Cramer Machine Acct.....	189.60
“ Hutton, Sand Machine...	212.50
“ Hutton, Sand Machine...	212.50
“ 27, Hutton Sand Machine....	152.
Aug. 14 Hutton Sand Machine....	350.
Oct. 20 Morgan Improv. Co.....	76.82
Nov. 16 “ “ “	82.31

I got the public contract on the T Street job. Mr. Buckman wanted to do the job, and we entered

(Testimony of Mr. Rauer.)

into a written contract, where he was to do the work. I was to furnish everything, and I was to get 1% on the investment, and I lost \$945. That job was late in July, 1915. If I testified at the original hearing that Buckman had nothing whatever to do with the T Street job I was in error.

I took possession of the equipment and personal property of the Sunset Construction Company under my mortgage before [268] the time the decree was rendered in the Superior Court action of *Wherle vs. Buckman, et al.* and I let it out to Mr. Hutton and others, and used it in connection with the Federal Construction Company jobs, and on all other jobs that had been assigned to me by the Federal Construction Company ever since I started to pay all the bills of the Sunset Construction Company on March 20, 1915. I will explain about this machine. I have a patent on that machine that nobody can use it, and I was to get so much money out of it, and I let them use it right along—all of these patents I have a patent on now, and nobody can use that machine without they pay for it; in consequence, when this money came in and I took that money and told Mr. Buckman I got that money and it would go to reduce the money that I spent in fixing these machines up and putting them in repair and building them. I collected that money as rental for this machine and I delivered possession of it to Mr. Hutton before I collected the rent. I had possession of this parti-

(Testimony of Mr. Rauer.)

cular machine at the time I was collecting rent for it. I had let it out, because I had a patent on it.

I had the same patent on the other three sand machines. I claim a patent covering three of the sand machines; one machine, I have forgotten the name, they tried to build, and infringed on the machine, and they were afraid to go on with it, and they sold out to Mr. Buckman, and Mr. Buckman took that machine over and used it, where they talked of this morning, about Mr. Dowling—I had nothing more to do with it than you had; he took it over there and used it just the same, and I never saw a cent of it.

I have a patent on the working of the machine; the machine that they built only cost \$300 or \$400 or at the utmost \$500. I did not let out all of these sand machines. McCoy used it, and if you will look on this page you have here you will see I never got a cent out of it, not a nickel. I will show you [269] if you want to look at it. Here are all of McCoy's machines, he took the money, and when I got wind of it, I took his promissory note for \$925—I took his note for all of these items that I have here; you will find it all in this statement.

The rental value of these sand machines and the balance of this equipment was just what you could get; Mr. McCoy claimed \$150 per month. I put up \$75, I think—here is this McCoy machine, they had no chains or anything, and I took the money out of my own pocket and put it up, so that

(Testimony of Mr. Rauer.)

they could get it in working order. The privilege of using the machine was worth \$150 a month, or more, if you could get it, not the rent of the machine.

I remember testifying in the case of myself vs. Fernando Nelson that the amount of the equipment that he had for use there was of the reasonable rental value of \$745 a month; I was talking of the patent and everything else. That was one sand machine, 25 cars, and a mile of track. That was in 1918. While Mr. Buckman was there, up to the time of the sale of the machine, I never got a cent, not one nickel, I think for seven or eight months.

I remained nominally the contractor on the T Street job from the time of its commencement until the time of its completion. The work was done on it in my name clear through the whole progress of the work; if you will refer to the T Street matter, I went and bought \$690 worth of wire there. Officially and according to the public records, I was the contractor with the Board of Public Works on the T Street job from the time of its commencement to the time of its completion. And the only contract I had with Buckman was a private contract between him and me. The equipment belonging to the Sunset Construction Co. was, in fact, used on that T Street job.

On the Hittel job at 22d and Lincoln Way I lost \$945.

I did not receive any money for the use of this equipment. You can see the items; I have got

(Testimony of Mr. Rauer.)

two items, don't you [270] see, down here, made out by Fillmore Buckman, and it says here there is a loss of \$945.

I testified in the Fernando Nelson case that I had an agreement with Buckman made after I bought this equipment at the sale in the bankruptcy court, by which I gave him an option to repurchase this machinery and all the rents received for it were to be credited. I remember in the Superior Court case to secure possession of this equipment that judgment was rendered the day after the action was filed, by stipulation. I agreed to give credit to Buckman for \$7,500, for the equipment in the Superior Court case, but at the sale in bankruptcy I bid in the property for \$3,750.

I gave Buckman credit for money received on the San Bruno Avenue job on the general running account.

I filed an account in the matter of the Buckman estate. The fact of Buckman's bankruptcy did not interrupt our business dealings at all. I continued on doing business with him the same as before. I was advancing him money on other jobs he was running outside of the San Bruno job. The amount of equipment on the San Bruno job consisted of two blocks, half a double track, and about 12 cars, two trains. I supplied teams on the San Bruno job through Mr. Cramer. The teams were supplied to the Federal Construction Company. I supplied the horses that went down about May 1st, 1915. The trustee in bankruptcy never interfered with the running of that equipment.

(Testimony of Mr. Rauer.)

The equipment was also used on the job at 43d Avenue—that is where Mr. Dowling had it—and then on a job of Eaton & Smith somewhere, I think they got from Heyman, and I lent them \$500.00 and I got \$460.00 back, and the lot that went in there to Mr. Chapman; I had nothing to do with it—never got a dollar. Then he had a government job over in the Spring Valley works somewhere.

Mr. Williams admitted that the trustee in bankruptcy never [271] disturbed Mr. Rauer in the use of the equipment.

This is a statement of account commencing in March 20, 1915, up to the date of Buckman's death. It includes items pertaining to the fixing of the sand machines. I advanced the money to keep them running. The understanding was that Buckman was to make these advancements but he didn't do it and so I had to. During that period I lost between \$16,000 and \$18,000 on my transactions with Buckman. I am familiar with the grading of 14th Avenue between A and B Streets. It was finished in January, 1915, and the grading between B and C Streets was finished in January, 1914, and on 14th Avenue between C and F Streets in May, 1914. That work was done a year and seven months before his bankruptcy. I could not estimate what I paid out for repairing the sand machines. The money mentioned in the account of the Federal Construction Co. being the first item dated April 24, 1915, for \$5760 was money paid to them for paving 14th Avenue.

(Testimony of Mr. Rauer.)

The bill for the Ajax Foundry, dated August 16, 1916, \$100 was for wheels for the sand machine and cars; the \$120 December 1, 1915, Enterprise Electric Company was to fix up the motor in the sand machine. As to the check dated January 27, 1918, payable to the order of A. E. Buckman for \$261 he wanted to get some money—I have got it down for \$250, but I find that the check is \$261. I gave him that money to buy materials for the sand machines and cars, etc. on the Nelson job.

I paid the bills I have here amounting to \$651.21 for repairing the sand machines. I paid the Pacific Gas & Electric Co. \$479, and received \$249 back, on the T Street job, so as to get the power to work the sand machine.

The MASTER.—This bill shows that \$499.40 was charged for [272] putting in the wire on the job at 40th Avenue and T Street. It provides: "Special main wire extension, subject to credit and refund as follows: 20% of monthly bills paid for current on the main line extension will be credited to your account monthly until the total amount of \$259.40 has been refunded. Salvage on wire, etc. \$240." It seems from this the whole amount was paid in and the whole amount was paid back. The contract is perfectly plain, Mr. Anthony. Apparently the idea is that the entire capital cost will be paid by the person using it, in the first place, but it will all come back to him. [273]

J. J. RAUER further testified that he had rented a block of land at \$25 per month from Feb. 15, 1915,

(Testimony of J. J. Rauer.)

to December, 1916, which block was used for the storing of the equipment and all auxiliaries, and from which it was moved to the various jobs and to which it was returned from such jobs.

J, J. RAUER also testified that the sand machine patent had been owned by A. Everett Hall and C. C. Higgins prior to August 15, 1916, and that he had rented the use of this patent in the City and County of San Francisco from them at \$100 a month from April 1915, to the time he purchased it from them on August 15, 1916, and that since then he has been the owner of it.

Plaintiff then introduced in evidence the following memorandum, and J. J. Rauer stated that it was an agreement between him and A. E. Buckman and that he had signed it, viz.:

“KNOW ALL MEN BY THESE PRESENTS: That I, J. J. Rauer hereby agree to make and execute to A. E. Buckman, an assignment and transfer of certain patent rights for the City and County of San Francisco, State of California, for sand moving machines, as set forth in the assignments made by A. Everett Ball and C. C. Higgins and A. E. Buckman, and also to make a bill of sale for three machines, wire, etc., under said patents, upon said Buckman paying to said Rauer the sum of \$2500, and interest thereon at the rate of one per cent per month, interest payable monthly.

It is understood that any money received for the use of said machines under said patent shall be credited and applied upon said sum of \$2500 and interest.

That any machines used by said Buckman on his contracts said Buckman shall pay to said Rauer the sum of \$200 per month while so using them, and all machines used by any other person, or persons on other work, the money received therefor shall be paid to said Rauer.

The payment of \$1500 of said \$2500 shall be credited on the debt of the Sunset Company.

This agreement and option shall be good for one year from date hereof, provided all agreements set forth above are complied with.

WITNESS my hand this 15th day of August,
A. D. 1916.

HATFIELD, Trustee,

vs.

BUCKMAN.

Pffs. Exh. H. M. Wright, Master.

J. J. RAUER.

[Endorsed]: Filed Dec. 12, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk." [274]

Entries in the "Voucher" or "Bill Book" kept by the Sunset Construction Co. to the following effect, were admitted in evidence:

"Henry Meyer 2232.

To SUNSET CONSTRUCTION
COMPANY, Dr.

1915

Jan. 22. For grading 14th Avenue bet.

A. and B. Sts. to the official
line and grade in front of
your property,

fronting 118 ft. @ \$5.50....649."

“Thos. A. Vogel, 2233.
1915 To SUNSET CONSTRUCTION
COMPANY, Dr.

Jan. 28. For grading 14th Ave. bet.
A. and B. Sts. to the official
line and grade in front of
your property,

fronting 24' 5" @ \$5.50.....137.50”

Also similar bills, under the same date, for grading
14th Avenue between A. and B. streets, @ \$5.50 per
front foot, were rendered to the following:

Bill Number	Name	Amount
2234	M. A. Webb	\$137.50
2235	John Mahoney	264.
2236	W. B. Ryder	264.
2237	Edw. H. Tarpey	264.
2238	M. Baker	165.
2239	Oscar Heyman	1419.
2251	Oscar Heyman	858.

“City and County of San Francisco 2241.

1915 To SUNSET CONSTRUCTION
COMPANY, Dr.,

Jan. 6.

For grading the crossing of 14th
Avenue & B. St. to a point 300 ft.
North in front of City property to
the official line and grade,.....\$495.”

Also a similar bill against the city and county of
San Francisco for the sum of \$495 for grading to a
point 300' south of said crossing.

“Sol. Getz & Sons, 2285.

To SUNSET CONSTRUCTION
COMPANY, Dr.,

1914

May 12. To grading 14th Avenue bet.
B. and F. Sts. to the official
[275] line and grade in front
of your property,

fronting 287 ft. @ \$3.50\$1004.50

“Academy of Science, G. G. Park, 1967.

To SUNSET CONSTRUCTION
COMPANY, Dr.,

To labor from Jan. 30 to

Feb. 12, 1914198.40

To materials 20.25

Plus 10%19.84 238.49”

“Academy of Science, G. G. Park, 1972.

To SUNSET CONSTRUCTION
COMPANY, Dr.,

To extra excavating & breaking

up and taking out old con-

crete piers, including powder,

fuse & labor,535.

Plus 10% 53.50 588.50

**Testimony of Fillmore Buckman, for Defendants
(Recalled).**

FILLMORE BUCKMAN testified that he made
the entries in the voucher or bill-book, and that this
was no more than a carbon copy of bills which had

(Testimony of Fillmore Buckman.)

been sent out by the Sunset Construction Co. That he knew the bills were correct when he sent them out and that they were made out and dated after the work covered by them had been finished. That sometimes delays occurred which made it necessary for a considerable period of time to elapse between the completion of the work and the rendition of the bill, but that bills were never sent out before the work was completed. Thereupon there was read into evidence from the "Black Book" the following entry:

"Jun. 3, 1915. Paid J. J. Rauer		
	Ck. Sol. Getz a/c	
	14th Ave.	521.38
"	E. E. Jordan	83.75
"		160.
Due from J. J. R.		
	on 5/25/15	33.34 798.47"

We had a contract with the Academy of Sciences at Golden Gate Park which was finished before bankruptcy. After [276] bankruptcy we did some extra work there but the extra work was done for a percentage over costs. The ledger of the Sunset Construction Company shows that J. J. Rauer collected \$300 as a balance upon the original contract. That had nothing to do with the extra work.

The cash-book of the Sunset Construction Co. was introduced in evidence and showed the following cash transactions occurring between J. J. Rauer and the Company between the dates of February 19, 1915 and March 16, 1915.

"1915.

Feb.	24.	Paid, J. J. Rauer to D. F. Cramer for stock hire in advance	\$200.
		Received J. J. Rauer C. B. Ass. Ryder note 14 Ave.	\$245.
March	1.	Received J. J. Rauer, loan,	30.
	2.	Received J. J. Rauer, loan,	200.
	3.	Paid J. J. Rauer,	355.
	5.	Received, J. J. Rauer	125.
	8.	Received J. J. Rauer,	300.
	12.	Received J. J. Rauer	75.
	12.	Paid 2 City Warrants,	495.
	8	Paid J. J. Rauer, to D. F. Cramer for stock hire	704.96
	8.	Paid J. J. Rauer	300.
	12.	Paid J. J. Rauer, Ck. of Scott,	535.
	12.	Paid R. Monigan col- lection	35.
	12.	Paid City Warrant	495.
	15.	Received J. J. Rauer,	175.
		Interest on \$20,000.	400.
		Loan	175.
		Difference Ex. of Cks.	69.50

Thereupon the matter was submitted to the Master in Chancery, and, on June 16, 1921, the Master made and filed his tentative report, which tentative report is contained in the record on this appeal; and thereupon both the plaintiff and the defendant J. J. Rauer filed exceptions to said report, and hearings upon said exceptions were duly had by the Master on August 27, 1921, and the same was further briefed by counsel. At said hearings plaintiff was represented by Messrs, Edwin H. Williams and Charles S. Wheeler, Jr., and defendant J. J. Rauer was represented by Messrs. H. M. Anthony and Grant & Zimdars; and after the hearings of said exceptions and objections the said Master made and filed his supplemental report herein on the 12th day of December, 1921; which said supplemental report is set forth in the record on appeal herein; and that thereafter defendant J. J. Rauer filed in the above-entitled court his objections to the Master's reports and to the confirmation thereof by the above-entitled court, and the hearing of said objections was duly had before the above-entitled court, Honorable Wm. C. Van Fleet, presiding, on the 2d day of August, 1922; whereupon the Court made and entered its order herein on the 30th day of September, 1922, overruling said objections and exceptions to the said reports of the Master, and confirming the same, and thereupon filed its final decree herein on Nov. 6, 1922, and which said order and final decree are contained in the record on appeal herein. [278]

The foregoing is proposed by defendant, J. J. Rauer, as the corrected statement of the case on appeal of said J. J. Rauer from said interlocutory decree and the said reports of the Master of Chancery, and from the final decree entered by the said District Court in and for the Northern District of California, Second Division, disallowing and overruling his exceptions to said reports of the Master in Chancery, and confirming said reports, and directing said J. J. Rauer to pay certain moneys to the Trustee in Bankruptcy.

This proposed statement includes those exceptions and amendments suggested by plaintiff to the proposed statement as originally presented which have been agreed upon between the parties as proper to be inserted in the statement; and also those others of said amendments and exceptions which were allowed at the hearing before Honorable William C. Van Fleet, Judge of said Court, on Friday, August 17th, 1923; and also has reduced to narrative form all the portions of the testimony which were included in the first proposed statement.

Dated August 21st, 1923.

H. M. ANTHONY,
GRANT & ZIMDARS,

Solicitors for Defendant and Appellant, J. J. Rauer.

Receipt of copy of the foregoing proposed statement received this 21st day of August, 1923.

CHAS. S. WHEELER, Jr.,
EDWIN H. WILLIAMS,

Solicitors for George J. Hatfield etc., Trustee in Bankruptcy of the Estate of A. E. Buckman, Bankrupt Respondent in said Appeal. [279]

The foregoing proposed statement embodies all the amendments heretofore proposed by plaintiff and allowed by the Court, and all amendments subsequently proposed by plaintiff.

Dated August 28th, 1923.

CHARLES S. WHEELER, Jr.

E. H. WILLIAMS,

Solicitors and Attorneys for Plaintiff. [280]

The foregoing is hereby settled and allowed as the statement on appeal of the defendant, J. J. Rauer from the order or decree made herein on the 11th day of September, 1922, including the order directing an accounting and referring the matter of the accounting to H. M. Wright, Master in Chancery of this court, and from the final decree made herein on the 6th day of November, 1922, disallowing and overruling the objections made by J. J. Rauer to the account and report filed herein by H. M. Wright, Master in Chancery, pursuant to the order of September 11, 1916, and confirming and approving said report, and decreeing that the said J. J. Rauer, defendant, pay to the plaintiff the sums of money in the said decree specified.

Dated August 28th, 1923.

(Sgd.) WM. C. VAN FLEET,

Judge of said Court.

[Endorsed]: Filed Aug. 28, 1923. Walter B. Maling, Clerk, By J. A. Schaertzer, Deputy Clerk. [281]

(Title of Court and Cause.)

Petition for Appeal from Order Made and Filed in this Action on September 30, 1922, Allowing Compensation to the Master H. M. Wright, Esq., as Compensation for Services in Said Action and Directing that the Same be Paid by J. J. Rauer, Defendant Herein.

Now comes J. J. Rauer, one of the defendants in the above-entitled action and feeling himself aggrieved by that certain order made and entered in the above-entitled cause and court and filed with the clerk thereof on the 30th day of September, 1922, allowing and fixing the compensation of the Master H. M. Wright, Esq., at the sum of \$1800 as and for compensation for his services herein and directing that the same be paid by said defendant J. J. Rauer in the first instance within twenty days after notice of the order, and which order was so made by the Honorable Wm. C. Van Fleet, Judge of said Court, does hereby appeal from said order, and from the whole thereof, in so far as it allows and fixes compensation for said Master as aforesaid, and directs that the same be paid by said defendant Rauer, and does so appeal to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in said defendant's assignment of errors, which is filed herewith, and defendant prays that this his appeal be allowed; and that citation issue, as provided by law, and that a transcript of the record, proceedings and papers

upon which said order was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, and your petitioner the said defendant Rauer being desirous of staying all proceedings under said order pending said appeal, and being desirous of giving and executing a supersedeas bond and giving such security as may be required to stay the enforcement of [282] said order as aforesaid, does further pray that the proper order be entered herein required to perfect said appeal and perfect and effect a stay of all proceedings, as aforesaid.

J. J. RAUER,

Defendant.

By H. M. ANTHONY and

GRANT & ZIMDARS,

Solicitors of Said Defendant.

[Endorsed]: Filed Oct. 14, 1922. W. B. Mal-
ling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[283]

(Title of Court and Cause.)

**Assignment of Errors on Appeal from Order Made
and Filed Herein on September 30, 1922,
Allowing \$1800 as Compensation to the
Master H. M. Wright, Esq., for Services
Rendered Herein.**

Now on this 14th day of October, 1922, comes the defendant J. J. Rauer by his solicitors, H. M. Anthony and Grant & Zimdars, and says that there

is manifest error on the face of the record in the above-entitled suit and that the order made and entered herein on the 30th day of September, 1922, allowing \$1800 compensation to the Master, H. M. Wright, Esq. is erroneous and unjust to this defendant, and said defendant hereby assigns the making and giving and entering of said order herein as error for the following reasons, and does not make and present the following assignment of errors upon which he will rely as follows, to wit:

EXCEPTION I.

The Court erred in finding and decreeing that said Master, H. M. Wright, Esq. was entitled to any compensation herein, the record showing that the said Master was acting judicially in the performance of the services for which the said sum of \$1800 was allowed as compensation as aforesaid, and the record showing that he was financially interested and would be financially affected by the judgment or report that he would make in the performance of the said services.

EXCEPTION II.

The Court erred in finding and decreeing that the said Master was qualified to perform the services for which compensation was allowed by said order, as aforesaid, and in not holding that the services were nugatory and of no value, and this because the Master as a judicial officer could not adjudge in a matter in which he would be affected financially [284] by the character of terms of the report he would make the Court.

EXCEPTION III.

The Court erred in finding and decreeing that the services of the said Master were of greater value than the sum of not to exceed \$750, and the Court erred in making an allowance to the Master of any sum in excess of \$750.

EXCEPTION IV.

The Court erred in finding and decreeing that the Master was entitled to any compensation, and this because it appears from the said record that the Master being disqualified to act judicially the services rendered were of no value, and of the fact as a matter of law, if not of fact, the Master had at all times during the performance of the services full knowledge.

WHEREFORE this defendant prays that the said order allowing compensation to the Master be reversed and set aside and that the defendant have such other and further relief as may seem meet and equitable.

H. M. ANTHONY and
GRANT and ZIMDARS,

Solicitors for Defendant J. J. Rauer.

[Endorsed]: Filed October 14, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[285]

(Title of Court and Cause.)

Order Allowing Appeal from Order Made and Filed Herein on September 30, 1922, Fixing Compensation of the Master H. M. Wright, Esq., and Directing the Payment of the Same by J. J. Rauer, and Fixing the Amount of a Supersedeas Bond and Bond for Costs on Appeal, and Staying Proceeding for the Enforcement of the Order from Which the Appeal is Taken.

This day the defendant J. J. Rauer, a defendant in the above-entitled action, appearing by his solicitors, Messrs. H. M. Anthony and Grant & Zimdars, and presented his petition for an appeal from that certain order made and filed herein on the 30th day of September, 1922, allowing the sum of \$1800 as compensation to the Master, H. M. Wright, Esq., and his assignment of errors accompanying the said petition, and by the said petition the said defendant having requested this Court to fix the amount of a supersedeas bond and also for costs and damages on appeal so to effect a stay of proceedings on the enforcement of the said order pending the Appeal, the said petition, upon due consideration is hereby allowed, and an Appeal from said order is hereby allowed to the United States Circuit Court of Appeals for the Ninth Circuit, upon the filing of a bond in the sum of Twenty-five Hundred Dollars, with a good and sufficient surety to be approved by the Court, the said bond

to operate as a supersedeas bond and for costs, and to fully stay all proceedings upon the order appealed from pending the appeal; and

IT IS FURTHER ORDERED that a complete transcript of all records, proceedings and papers upon which the said order appealed from was based, duly authenticated, be certified and sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 14th day of October, 1922.

WM. C. VAN FLEET,
Judge of Said Court. [286]

[Endorsed]: Filed Oct. 14, 1922. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [287]

Bond on Appeal.

(The premium charged for this bond is twenty-five dollars per annum.)

KNOW ALL MEN BY THESE PRESENTS, That we, J. J. Rauer as principal and Fidelity and Deposit Company of Maryland, a Corporation created, organized and existing under and by virtue of the laws of the State of Maryland, as surety, are held and firmly bound unto H. M. Wright in the full and just sum of Twenty-five Hundred (\$2500) Dollars, to be paid to the said H. M. Wright, his certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 16th day of October in the year of our Lord One Thousand, Nine Hundred and Twenty-two.

WHEREAS, lately at a District Court of the United States for the Southern Division of the Northern District of California in a suit depending in said Court, between George H. Hatfield, as trustee of the estate of A. E. Buckman, a Bankrupt, plaintiff vs. A. E. Buckman, J. J. Rauer, et al., are defendants a judgment and order was rendered against the said J. J. Rauer directing him to pay H. M. Wright the sum of \$1800 and the said J. J. Rauer having obtained from said Court an order allowing an appeal to the United States Court of Appeals to reverse the said order in the aforesaid suit, and a citation directed to the said Wright and the other parties to said action citing and admonishing them to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California.

Now, the condition of the above obligation is such, That if the said J. J. Rauer shall prosecute said appeal to effect, and answer all damages and costs if he fail to make [288] said appeal and plea good, then the above obligation to be void; else to remain in full force and virtue.

Acknowledged before me the day and year first above written.

J. J. RAUER (Seal)

FIDELITY AND DEPOSIT CO., of Md. (Seal)

By F. E. Brisbane,
Attorney in Fact.

Paul M. Nippert (Seal)
Agent.

State of California,

City and County of San Francisco,—ss.

On the 16th day of October, A. D. 1922, before me John McCallan, a Notary Public in and for the city and county of San Francisco, residing therein duly commissioned and sworn, personally appeared F. E. Brisbane, Attorney in Fact, and Paul M. Nippert, Agent, of the Fidelity and Deposit Company, of Maryland, a corporation, known to me to be the persons who executed the within instrument on behalf of the corporation therein named and acknowledged to me that such corporation executed the same, and also known to me to be persons whose names are subscribed to the within instrument as the Attorney in Fact and Agent respectively of said corporation, and they, and each of them, acknowledged to me that they subscribed the name of said Fidelity and Deposit Company of Maryland thereto as principal and their own names as Attorney in Fact and Agent respectively.

In Witness whereof, I have hereunto set my hand and affixed my official seal at my office in the city

and county of San Francisco the day and year first above written.

[Seal]

JOHN McCALLAN,

Notary Public in and for the City and County of
San Francisco, State of California. [289]

Form of bond and sufficiency of sureties approved.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Oct. 16, 1922. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [290]

(Title of Court and Cause.)

**Defendant Rauer's Praecept to Clerk to Prepare
Transcript on Appeal from Order Allowing
Compensation to H. M. Wright.**

To the Clerk of the above-entitled Court.

Sir:

You will please prepare transcript of record in the above-entitled cause to the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial District, pursuant to the appeal heretofore allowed herein and directed to said court from the order made and filed in said action on September 30, 1922, allowing compensation to the Master, H. M. Wright, Esq., as compensation for services in said action, and directing that the same be paid by J. J. Rauer, one of the defendants herein, and from the decree allowing said compensation to said Master, H. M. Wright, Esq., and include in the

said transcript the following proceedings, pleadings and papers on file, to wit:

1. The complaint of bill in said action;
2. The answer of the defendants thereto;
3. Supplement to the bill, and answer.
4. The interlocutory decree therein;
5. The petition of the Master for compensation and statement of the services rendered by him in the preparation of the report for which compensation is asked.
6. Objections of defendant Rauer to the special Master's petition for compensation.
7. Order confirming the report of the Master.
8. Order and decree filed herein September 30, 1922, fixing the compensation.
9. Decree confirming Master's report and giving [291] judgment in favor of the plaintiff in said action against the defendants therein as in said decree specified.
10. Defendant Rauer's petition for appeal from order allowing the said compensation.
11. Defendant's assignment of error on appeal from said last-mentioned order.
12. Order allowing appeal from the said order and fixing bond on appeal and to stay proceedings.
13. Bond on appeal from said last-mentioned order on appeal.
14. Citation on appeal, admission and affidavit of service from the said last-mentioned order.
15. This praecipe.

Said transcript to be prepared as required by law, and the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and filed in the office of the Clerk of the United States Circuit Court of Appeals on or before the 15th day of November, 1922.

Dated, at San Francisco, November 9, 1922.

J. J. RAUER,

Defendant and Appellant Herein.

By H. M. ANTHONY and

GRANT & ZIMDARS,

His Solicitors.

Service of copy of the within praecipe admitted this 10th day of November, 1922.

CHARLES S. WHEELER and

CHARLES S. WHEELER, Jr.

E. H. WILLIAMS,

Attorneys for Plaintiff.

WM. H. CHAPMAN.

H. M. WRIGHT.

[Endorsed]: Filed Nov. 10, 1922. Walter B. Maling, Clerk. [292]

(Title of Court and Cause.)

Petition for Appeal from an Order or Decree Made Herein on the 11th Day of September, 1916, Directing an Accounting and Referring the Matter of the Accounting to H. M. Wright, Master in Chancery of this Court, and Also Allowing an Appeal from the Final Decree Made Herein on the 6th Day of November, 1922, Disallowing and Overruling the Objections Made by J. J. Rauer to the Account and Report Filed Herein by H. M. Wright, Master in Chancery, Pursuant to the Order of Sept. 11, 1916, and Confirming and Approving Said Report, and Decreeing that the Said J. J. Rauer, Defendant, Pay to the Plaintiff the Sums of Money in the Said Decree Specified.

Now comes the defendant, J. J. Rauer, one of the defendants in the above-entitled action, and feeling himself aggrieved by that certain order of decree made and entered on the 11th day of September, 1916, directing an accounting and referring the matter of the accounting to H. M. Wright, Master in Chancery of this Court, and by the whole of said order; also feeling himself aggrieved by that certain decree made herein on the 6th day of November, 1922, disallowing and overruling the objections made by J. J. Rauer to the account and report filed herein by H. M. Wright, Master in Chancery to the order of September 11, 1916, and confirming and approving said report, and decreeing that

the said J. J. Rauer, defendant, pay to the plaintiff the sums of money in the said decree specified, and by the whole of said judgment and decree, does hereby appeal from said orders and decrees and from the whole thereof, and does so appeal to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in said defendant's assignment of errors, which is filed herewith; and said defendant prays that his said appeal be allowed, and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said order was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting in San Francisco; and your petitioner, the said defendant J. J. Rauer, [293] being desirous of staying all proceedings under said orders and decrees pending the appeal therefrom, and being desirous of giving and executing a supersedeas bond, and giving such security as may be required to stay the enforcement of the said orders and decrees aforesaid, does further pray that the proper order be entered herein required to perfect the said appeal, and perfect and effect a stay of all proceedings, as aforesaid.

J. J. RAUER,
Defendant.

By H. M. ANTHONY and
GRANT & ZIMDARS,
WM. GRANT and J. B. ZIMDARS,
Solicitors for Said Deft.

[Endorsed]: Filed Nov. 18, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [294]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

IN EQUITY—No. 233.

GEORGE H. HATFIELD, Substituted for R. CORDS, JR., as Trustee of the Estate of A. E. BUCKMAN, Bankrupt,
Plaintiff,

vs.

A. E. BUCKMAN, et al.,

Defendant.

Assignment of Errors on Appeal from an Order or Decree Made Herein on the 11th day of September, 1916, Directing an Accounting and Referring the Matter of the Accounting to H. M. Wright, Master in Chancery of this Court, and Also Allowing an Appeal from the Final Decree Made Herein on the 6th day of November, 1922, Disallowing and Overruling the Objection Made by J. J. Rauer to the Account and Report Filed Herein by H. M. Wright, Master in Chancery, Pursuant to the Order of Sept. 11, 1916, and Confirming and Approving Said Report, and Decreeing

that the Said J. J. Rauer, Defendant, Pay to the Plaintiff the Sums of Money in the Decree Specified.

Now on this 13th day of November, 1922, comes the defendant J. J. Rauer, by his solicitors, H. M. Anthony and Grant & Zimdars, and says that there is manifest error on the face of the record in the above-entitled suit, and that the order made and entered herein on the 11th day of September, 1916, directing an accounting and referring the matter of the accounting to H. M. Wright, Master in Chancery of this court, and in the whole of said order, and that certain decree made herein on the 6th day of November, 1922, disallowing and overruling the objections made by J. J. Rauer to the account and report filed herein by H. M. Wright, Master in Chancery, to the order of September 11, 1916, and confirming and approving said report and decreeing that the said J. J. Rauer, defendant, pay to the plaintiff the sums of money in the said decree specified, that the same are [295] and each of them is erroneous and unjust to this defendant; and the said defendant hereby assigns the making and giving and entering of the said order and decrees herein as error for the following reasons; and does so make and present the following assignment of errors upon which he relies as follows, to wit:

In order to make clear the following assignments of error addressed to the order made herein on the 11th day of September, 1916, the following statement is made.

It is the contention of defendant Rauer that the proper construction of the said order and decree of Sept. 11, 1916, is that the Court has found that Buckman is the owner, as alleged in the complaint, of all the capital stock of the Sunset Construction Company, a corporation, and that the transfer made by said Buckman to Rauer of the said shares of stock was made for the purpose of defrauding the creditors of Rauer, as alleged in the complaint in the action, and that the decree adjudges that said transfer of the said shares of stock was void as to the creditors of Buckman, and that Rauer account for all transactions with the corporation, and to have such accounting the matter is referred to the Master.

The plaintiff makes the following contention relative to the construction of the said decree, and which construction is adopted by the Master and is the basis of his report, and is the construction adopted by the Court and confirming the Master's report. The said construction so contended for by plaintiff is as follows: That the said decree determines that there was no such entity as the Sunset Construction Co., that the issues raised and determined by the decree was not in reference to the ownership of the shares of stock in any corporation, but there was a determination that there was no [296] corporation in existence and that Rauer should account to the trustee in bankruptcy, as if his transactions were directly with the bankrupt with full knowledge of the bankruptcy. In other words, the decree according to this contention

should be regarded as a determination that Rauer was a participant in a fraudulent scheme whereby under the cloak of the nominal corporation, Sunset Construction Company, Buckman and Rauer had transactions with each other for the purpose of defrauding the creditors of Buckman.

We will firstly assign errors based upon the construction contended for by the defendant Rauer as above stated, and will follow the assignment of errors based upon the construction contended for by the plaintiff and admitted by the Master in making his report.

EXCEPTION I.

Assuming that the construction contended for by the defendant Rauer is the proper construction of said decree of September 11, 1916, the said decree is erroneous for the following reasons:

The evidence shows that paragraph 1, of said interlocutory decree and order of Sept. 11, 1916, wherein it is decreed that Buckman was the owner of all the outstanding shares of the capital stock of Sunset Construction Co. from the time of its organization down to the 19th day of February, 1915, at which time it vested in his trustee in bankruptcy, is not sustained by the evidence, but on the contrary the evidence shows that on the 15th day of January, 1914, all the issued shares of stock of the said corporation, excepting qualifying shares to other persons who served as directors, were pledged to the defendant J. J. Rauer for the sum of \$20,000.00 at that date owing by [297] the corporation to the defendant Rauer, and to secure the payment of

which the said Buckman pledged the said shares of stock, and that pursuant to the said pledge and the failure to pay the indebtedness designed to be secured by said pledge, the said stock was sold under pledgee sale on August 12, 1914, and subsequently the ownership thereof passed to the defendant J. A. Meadows.

EXCEPTION II.

That said decree of September 11, 1916, is erroneous wherein it is held in Paragraph 2 that Buckman was at all times up to the 19th day of February, 1915, the owner of the Sunset Construction Co. and of all the property and books of said corporation that on said last-mentioned date vested in the Trustee in Bankruptcy of said Buckman, and that the said property is since held by said Trustee in Bankruptcy pending an accounting between said company and the defendants therein named, including Rauer, for the following reason:

That the evidence shows the state of facts hereinbefore stated under Exception I of this assignment of errors, and further the evidence shows that the Sunset Construction Company was a corporation duly organized and existing under the laws of the State of California, or if the same were not duly organized and existing under the laws of the State of California, the said corporation and all persons controlling the same, caused the said so-called corporation to function as a corporation, and it was at least a *de facto* corporation, and that it is not alleged in the pleadings that Rauer was in any sense cognizant of any defect in the organi-

zation of said corporation, but on the contrary the evidence shows that Rauer dealt with the corporation and with the persons controlling [298] the same in all respects as if it were a duly incorporated corporation and had no knowledge or notice of any kind that any such corporation had been formed for the purpose of defeating or defrauding the creditors of Buckman, but on the contrary the evidence shows that all the transactions of said Rauer with the so-called entity, Sunset Construction Co. were in good faith and in the full belief that he was authorized to transact business therewith, and that the said Rauer had nothing whatever to do with the formation of said corporation, and had no connection of any kind therewith and had no knowledge of any purpose on the part of the incorporators, if any such there were, to use said corporation to defraud creditors of Buckman, and he did not in any wise participate in any wrongful dealings with Buckman.

EXCEPTION III.

The said decree of September 11, 1916, is erroneous wherein it is decreed in Paragraph 3 that the said defendant J. J. Rauer account for all moneys received by him or advanced by him to the defendant Sunset Construction Co. since the 12th day of September, 1911, for the purpose of determining what claims, if any, existed between said Company and the said defendants in said action, for the following reason:

That the evidence shows the state of facts set forth in Exceptions I and II of this assignment of

errors, and therefore the Trustee in Bankruptcy as the assignee of A. E. Buckman has no interest in any such accounting as is ordered by the said paragraph of said decree.

EXCEPTION IV.

The decree is erroneous for the following reason: That the evidence shows that there was a valid pledge upon the [299] shares of stock to the defendant Rauer, and that if it be assumed that the pledgee sale did not legally divest Buckman of his ownership in the shares, the pledge itself and the indebtedness which it secured still existed, and the decree is erroneous in not providing for the protection and safeguarding of the pledged interest and indebtedness and having the same taken into account on the reference to the Master.

EXCEPTION V.

Defendant Rauer now assigns the said decree of Sept. 11, 1916, to be erroneous, and this assignment is based upon the construction of said decree contended for by the plaintiff and adopted by the Master and the Court, as hereinbefore set forth.

The decree is erroneous wherein by Paragraphs 1, 2 and 3, it decrees that Buckman was the owner of all of the capital stock of said corporation up to the time of its adjudication in bankruptcy on the 9th day of February, 1915, and decreeing that since that date the trustee in bankruptcy was the owner of said capital stock, and decreeing that Buckman was the owner of the corporation up to the date of its adjudication in bankruptcy, and as such the owner of all the property, books and records of the

corporation, and that from the date of his said adjudication in bankruptcy, his trustee in bankruptcy, is the owner of all the property of the said corporation.

No issue is tendered by the pleadings that Rauer participated in the organization of the corporation, Sunset Construction Co., or that he had any knowledge that the said corporation was not duly organized and possessed of capacity to transact business; and in this connection this defendant refers to Exceptions I, II and III in support of and as reasons supporting this fourth assignment of errors. [300]

EXCEPTION VII.

The decree is erroneous, and the defendant Rauer takes exception thereto for the following reason:

That the evidence shows that Rauer had no knowledge or notice that the corporation, Sunset Construction Co., was a cloak or cover to enable Buckman to defraud his creditors, if such were his purpose in forming the corporation, and that Rauer advanced the sum of money designed to be secured by the pledge of the shares of stock in good faith, as security for the sum of money evidenced by the pledge, and that if Buckman transacted business in the name of the corporation and other people transacted business with him in the belief that the corporation was the owner of the property, and that the corporation had an existence, Buckman could be estopped from making any claim to the contrary so far as those persons are concerned who transacted business with him upon

his aforesaid representation, and the evidence shows that Rauer was in this category, and the trustee in bankruptcy or Buckman would have no greater rights than the said Buckman to make claim that the corporation was not the owner of the property. A court of equity will look through a transaction and will give Rauer a lien by way of pledge on the property which was designed to be pledged, whether that property stands in the form of shares of stock in a corporation, or on other assets supposed to be represented by said shares, and the decree should protect Rauer in these advances so made and so designed to be secured by said pledge. [301]

The following assignments of errors are directed to the final decree made herein on the 6th day of November, 1922, disallowing and overruling the objections made by J. J. Rauer to the account and report filed herein by H. M. Wright, the Master in Chancery, to the order of September 11, 1916, and confirming and approving said report, and decreeing that the said J. J. Rauer, defendant, pay to the plaintiff the sums of money in the said decree specified.

EXCEPTION VIII.

The Master's said report, and the whole thereof, should be set aside and considered null and void, and the failure so to do is hereby assigned as error, and for the following reasons:

That it appears from the record in this case that the action is prosecuted by a trustee in bankruptcy, who is not personally liable for the payment of any

obligations beyond the extent of assets coming into his hands; that there are no assets of any kind belonging to the bankrupt estate, other than such as might result from the judgment in this case. That this fact was known and recognized by the Master in his petition to be allowed the sum of \$5,000.00 as compensation for his services in making the report. That in view of the fact that it appears by the record and by the statement of the Master himself in his petition for compensation herein, that only in the event of a judgment against the defendant Rauer, would he receive any compensation for his services, the record shows that he was financially affected by the character of the report he would file and by the judgment to be entered thereon, and therefore his report is void as being made by a judicial officer on a subject matter in which he had a financial interest, and the judgment and report filed herein being in favor of that interest. [302]

EXCEPTION IX.

The final decree adopted in the Master's report and the Master's report are erroneous in the following particulars, which the defendant Rauer hereby assigns as error. The decree and the Master's report adopted and confirmed by the decree are erroneous in its recital that by the decree of September 11, 1916, it was adjudged and decreed that the defendant Buckman was at all times up to the 19th day of February, the owner of the Sunset Construction Co. and of the property and books of said company, and since said date, the trustee in bankruptcy of said estate is the owner thereof; and that the

defendants A. E. Buckman, J. J. Rauer, Fillmore Buckman and William H. Chapman severally account for all moneys received by them, or any of them from the Sunset Construction Co. since the 12th day of September, 1911, and in support of this assignment of error defendant Rauer refers to the matters and things set forth in Exceptions I, II, III and IV of this assignment of errors.

EXCEPTION X.

The defendant Rauer assigns as error that part of the Master's report finding that the sum of \$13,-023.19 has been received by the defendant Rauer from the Sunset Construction Co., a corporation, since February 19, 1915, and that the same is payable to the plaintiff trustee, because the evidence shows there was owing on said date to the defendant Rauer from the Sunset Construction Company the sum of \$18,746.22, and in not allowing the said credit due Rauer as an offset to said item of \$13,-023.19, and especially is this true and an assignment of error because the Master in his report relative to this item finds as follows:

“that Rauer must account to this trustee for [303] dealings with the company's assets owned on February 19, 1915, after that date, without the benefit of set-offs subsequently accruing. There are, of course, difficulties arising out of the fact that the company was never declared a bankrupt, and its creditors have not been scheduled and notified to file their claims, and that defendant Rauer will suffer loss by reason of the fact that he believed himself en-

titled to deal with the company after Buckman's bankruptcy as a separate entity, not affected by his bankruptcy."

And defendant Rauer assigns as error that part of the final decree adopting and confirming and embodying in the decree the aforesaid provision of the Master's report disallowing the right of off-set to Rauer of the amount owing by the Sunset Construction Co. to Rauer as of the date of the filing of the petition in bankruptcy by Buckman, and which assignment of error is the subject matter of Exception I of the exceptions filed by defendant J. J. Rauer to the Master's report herein, to which reference is made, with the request that said Exception I be read in connection with this assignment of error X.

EXCEPTION XI.

The final decree adopted in the Master's report, and the Master's report are erroneous in the following particulars, which the defendant Rauer hereby assigns as error; and hereby refers to the refusal of the Master to take into account the transactions between the defendant Rauer and the said Sunset Construction Co. of the moneys advanced or paid out by said Rauer after February 19, 1915, and prior to the making of the interlocutory decree and up to the time of the making of which said Rauer had no knowledge or notice that any contention was being made that he, Rauer, had no right to deal with the Sunset Construction Co. as a separate entity, and that he was being charged with the consequences of doing business with a declared [304]

bankrupt, and the refusal to take such transaction into account is injurious and damaging to this defendant Rauer, because the evidence shows that after the said 19th day of February, 1915, and prior to the making of said interlocutory order, the said Rauer had advanced the sum of \$18,561.54, which sum, plus the \$18,746.22 found by the Master to be owing to Rauer at the time of the petition in bankruptcy showed the sum of \$37,307.76, and the refusal to state such account is not in accordance with the terms of the order of reference, and which matters are included in Exception II of the exceptions filed by defendant Rauer to the Master's report, and for the reasons aforesaid the said account of the Master and the final decree made by this Court confirming said report, is alleged to be error.

EXCEPTION XII.

The final decree adopted in the Master's report and the Master's report are erroneous in the following particulars which the defendant Rauer hereby assigns as error, and hereby refers to that part of the Master's report wherein it is stated that the sum of money owing to defendant Rauer at the time of the filing of the petition in bankruptcy on February 19, 1915, by the Sunset Construction Co. was the sum of \$18,746.22, whereas and in fact the evidence shows that there was owing at said time by said corporation to said Rauer the sum of \$26,246.22, and this present assignment of error is the subject matter of Exception III of defendant Rauer's exceptions to the Master's report filed herein, and to which exception defendant

Rauer hereby refers and requests be considered in support of the present assignment of error.

EXCEPTION XIII.

The final decree adopted in the Master's report and the Master's report are erroneous in the following particulars [305] which the defendant Rauer hereby assigns as error, and hereby refers to that part of the Master's report and findings wherein the Master finds that Rauer must account to Buckman's trustee for the sum of \$4,016.20 as moneys received by defendant Rauer as assets belonging to said corporation on February 19, 1915, and the collection of which was made by the defendant Rauer after said date, whereas as a matter of fact the evidence shows that the defendant Rauer should not be charged with any part of said sum of \$4,016.20, and the present assignment of error is the subject matter of Exception IV filed herein by the defendant Rauer to the Master's report, and to which reference is hereby made with the request that same be considered in support of the present assignment of error.

EXCEPTION XIV.

The final decree adopted in the Master's report and the Master's report are erroneous in the following particulars which the defendant Rauer hereby assigns as error, and hereby refers to that part of the Master's report and findings wherein the Master finds the defendant Rauer must pay to the trustee in bankruptcy the sum of \$9,016.90 for the rental value and use after February 19, 1915, of the equipment and personal property of the Sunset

Construction Co. mortgaged to the defendant Rauer, whereas the evidence shows that under no circumstances and upon any theory should the rental of said machinery exceed the sum of \$1,838.56, after making a proper deduction for repairs in connection with the upkeep of the said machinery as shown by the evidence; and this assignment of error is the subject matter of Exception V filed by the defendant Rauer to the report of the Master, and to which exception the defendant Rauer refers and requests be considered in support of this assignment of error. [306]

EXCEPTION XV.

The final decree adopted in the Master's report and the Master's report are erroneous in the following particulars which the defendant Rauer hereby assigns as error, and hereby refers to that part of the Master's report and findings which refuses and omits to allow the rental value of said machinery charged to the defendant Rauer as a credit on the mortgage indebtedness due Rauer, and to secure the payment of which the said property was mortgaged to Rauer with the right of possession upon default, as shown by the evidence, and this present assignment of error is the subject matter of Exception V filed by the defendant Rauer, and to which exception defendant Rauer refers and requests be considered in support of the present assignment of error.

EXCEPTION XVI.

The final decree adopted in the Master's report and the Master's report are erroneous in the fol-

lowing particulars which the defendant Rauer hereby assigns as error, and hereby refers to that part of the Master's report wherein the Master finds and refuses to allow the defendant Rauer as an offset to the value of the use of the said personal property and equipment of the Sunset Construction Co., the cost of the repairing and maintaining of the property while in use, and refusing to allow the advances made by said Rauer to the Sunset Construction Co., or upon the debts that the Sunset Construction Co. owed, and which is the subject matter of Exception V of defendant Rauer's exceptions to the Master's report on file herein, and which exception the defendant requests be considered read in connection with and in support of this assignment of error. [307]

EXCEPTION XVII.

The final decree adopted in the Master's report and the Master's report are erroneous in the following particulars which the defendant Rauer hereby assigns as error, and hereby refers to that part of the Master's report wherein it is found that the defendant Rauer shall be charged with the sum of \$5,381.79 as gross profits as received from the contract between the Federal Construction Company and the Sunset Construction Co. about January, 1915, whereas the evidence shows no part of said sum should be charged against the defendant Rauer, and this present assignment of error is the subject matter of Exception V of the exceptions filed by the defendant Rauer to the Master's report, and to which exception reference is hereby made,

and it is requested that the same be read in support of the present assignment of error.

EXCEPTION XVIII.

The final decree adopted by the Master's report and the Master's report are erroneous because it proceeds upon the construction and theory that the plaintiff's construction of the interlocutory decree and order of Sept. 11, 1916, is the right theory and construction of said decree, and in which connection the present assignment is the subject matter of Exception VI of the exceptions filed by the defendant Rauer to the report of the Master, and this assignment of error is also included in the subject matter of Exceptions I to VI, inclusive of this present writing and assignment of errors, and the defendant Rauer prays that the said Exception VI to defendant Rauer's exceptions to the Master's report, and the first six exceptions of the present assignments of error be read in connection with this present assignment of error, and in support thereof. [308]

EXCEPTION XIX.

The final decree adopted in the Master's report and the Master's report are erroneous in the following particulars, which the defendant J. J. Rauer hereby assigns as error, and hereby refers to that part of the final decree numbered (3) wherein it is decreed that the sum of \$3,701.60 on deposit in the matter of the bankrupt estate of said A. E. Buckman, and belonging to the defendant Rauer, should be retained by the plaintiff and payment made to said J. J. Rauer by credit on the amount

found due by the report of said Rauer to the said plaintiff, whereas and in fact the evidence shows the said sum of money should be paid to the defendant Rauer, and there is nothing owing from the said defendant Rauer to the said trustee in bankruptcy.

EXCEPTION XX.

The final decree adopted in the Master's report and the Master's report are erroneous in the following particulars, which the defendant J. J. Rauer, hereby assigns as error, and hereby refers to that part of the final decree numbered (4) wherein it is found that there is due from the defendant Rauer to the plaintiff trustee after crediting the said sum of \$3,701.60 now in possession of the Court and belonging to the defendant Rauer the sum of \$9,321.59, the same being moneys belonging to the estate of A. E. Buckman, the bankrupt, collected and wrongfully retained by the defendant Rauer, and which sum he is directed to pay to the said trustee, whereas the evidence shows that the defendant Rauer is not indebted in any sum of money to the plaintiff trustee on any account whatsoever.

EXCEPTION XXI.

The final decree adopted in the Master's report and the Master's report are erroneous in the following particulars, which the defendant J. J. Rauer hereby assigns as error, and [309] hereby refers to that part of the final decree numbered (5), wherein it is found there is due from the estate in bankruptcy of Buckman to Rauer the sum of \$15,044.62 after crediting on the total amount due

J. J. Rauer from said estate the before mentioned sum of \$3,701.60, whereas and in fact the evidence shows if the erroneous theory be adopted that the said J. J. Rauer was transacting business with the estate of the bankrupt, and that the claim of said J. J. Rauer is against the estate of the bankrupt, and not as hereinbefore set forth, an indebtedness arising out of transactions between said J. J. Rauer and the Sunset Construction Co., there is due and owing from said estate to said J. J. Rauer over and above all just counterclaims and off-sets the sum of \$37,307.76.

EXCEPTION XXII.

The final decree adopted in the Master's report and the Master's report are erroneous in the following particulars, which the defendant J. J. Rauer, hereby assigns as error, and hereby refers to that part of the final decree numbered (6) giving a judgment in favor of plaintiff against the defendant Rauer for costs and disbursements upon the suit, whereas the evidence shows that nothing is owing from the defendant Rauer, and no judgment should go against him.

WHEREFORE this defendant prays that the said interlocutory order and decree of September 11, 1916 and the said final decree entered herein ratifying and confirming the Master's report, and said Master's report, and which interlocutory order and decree and final decree and Master's report are the subject matter of the foregoing assignment of errors, be reversed and set aside, and that this

defendant have such other and further relief as may seem meet and equitable.

H. M. ANTHONY,
GRANT & ZIMDARS,
WM. GRANT, and
J. B. ZIMDARS,

Solicitors for Appellant, J. J. Rauer.

[Endorsed]: Filed Nov. 18, 1922. W. B. Mal-
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.
[310]

(Title of Court and Cause.)

**Order Allowing Appeal from an Order or Decree
made Herein on the 11th Day of September,
1916, Directing an Accounting and Referring
the Matter of the Accounting to H. M. Wright,
Master in Chancery of this Court, and also
Allowing an Appeal from the Final Decree
made Herein on the 6th Day of November,
1922, Disallowing and Overruling the Objec-
tions made by J. J. Rauer to the Account and
Report Filed Herein by H. M. Wright, Master
in Chancery, Pursuant to the Order of Sept.
11, 1916, and Confirming and Approving Said
Report, and Decreeing that the Said J. J.
Rauer, Defendant, Pay to the Plaintiff the
Sums of Money in the Said Decree Specified;
and Fixing the Amount of Supersedeas Bond
and Bond for Costs on Appeal and Staying all**

**Proceedings for the Enforcement of the Order
and Judgment, from Which the Appeal is
Taken.**

This day the defendant J. J. Rauer, a defendant in the above-entitled action appeared by his solicitors H. M. Anthony and Grant & Zimdars, and presented this petition for an appeal from an order or decree made herein on the 11th day of September, 1916, directing an accounting and referring the matter of the accounting to H. M. Wright, Master in Chancery of this Court, and also allowing an appeal from the final decree made herein on the 6th day of November, 1922, disallowing and overruling the objections made by J. J. Rauer to the account and report filed herein by H. M. Wright, Master in Chancery, pursuant to the order of Sept. 11, 1916, and confirming and approving said report, and decreeing that the said J. J. Rauer, defendant, pay to the plaintiff the sums of money in the said decree specified; and his assignment of errors accompanying the said petition, and by the said petition said defendant having requested this Court to fix the amount of a supersedeas bond, and also bond for costs and damages on appeal so as to effect a stay of proceedings on the enforcement of the said orders, decrees and judgments pending the appeal, the said petition, upon due consideration is hereby allowed, and an appeal from the said orders, decrees and judgments is hereby allowed to the United States Circuit Court of Appeals, Ninth Circuit, upon the filing of a bond in the sum

of Eleven Thousand Dollars (\$11,000) *Dollars*, with a good and sufficient surety to be approved by this Court, the said bond to operate as a supersedeas [311] bond for costs, and to fully stay all proceedings upon the orders, decrees and judgments appealed from pending the appeal; and

IT IS FURTHER ORDERED that a complete transcript of all records, proceedings and papers upon which the said order, decrees and judgments appealed from were based, fully authenticated, be certified and sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 18th day of November, 1922.

WM. C. VAN FLEET,

Judge of Said Court.

[Endorsed]: Filed Nov. 18, 1922. W. B. Mal-
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.
[312]

(Supersedeas Bond on Appeal.)

The premium charged for this bond is \$110.00 Dollars per annum.

KNOW ALL MEN BY THESE PRESENTS, That we, J. J. Rauer, as principal, and Fidelity and Deposit Company of Maryland, as sureties, are held and firmly bound unto George J. Hatfield, as Trustee in Bankruptcy of the Estate of A. E. Buckman, a bankrupt, in the full and just sum of Eleven Thousand (\$11,000) Dollars, to be paid to the said George J. Hatfield, as trustee, as afore-said, his successors, certain attorney, executors,

administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 20th day of November in the year of our Lord One Thousand, Nine Hundred and Twenty-two.

WHEREAS, lately at Southern Division District Court of the United States for the Northern District of California in a suit depending in said Court, between the aforesaid George J. Hatfield, as trustee in bankruptcy, as plaintiff, and A. E. Buckman, J. J. Rauer and others, defendants, No. 233 in Equity, an order and decree was entered directing an accounting between the said Hatfield, as trustee, as aforesaid, and the said Defendant Rauer, and thereafter a decree was entered whereby it was adjudged and decreed that the said plaintiff recover from the said defendant Rauer the sum of \$9,321.59, with interest from the 6th day of November, 1922, and costs, and directing the said Rauer to pay said sum to the said plaintiff, and the said defendant obtained from said Court in the aforesaid suit an order allowing an appeal to the United States Circuit Court of Appeals to reverse the said order and decree in the aforesaid suit, and the said Court having fixed upon the said sum of \$11,000 as a supersedeas bond and for costs and to fully stay all proceedings upon said order and decree appealed from pending the appeal, and said Rauer having obtained a citation directed to said plaintiff and the other [313] parties to the suit

citing and admonishing them to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, in the State of California.

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That if the said J. J. Rauer shall prosecute said appeal to effect, and answer all damages and costs if he fail to make said appeal good, then the above obligation to be void; else to remain in full force and virtue.

Acknowledged before me the day and year first above written.

J. J. RAUER. (Seal)

FIDELITY AND DEPOSIT CO. of MD.

By F. E. Brisbine (Seal)

Attorney in Fact.

E. K. McCOORY (Seal)

Agent.

Form of bond and sufficiency of sureties approved.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Nov. 21, 1922. Walter B. Maling, Clerk. [314]

(Title of Court and Cause.)

Praeipie for Preparing Record on Appeal.

To the Clerk of the Above-entitled Court:

Sir:

You will please prepare transcript of record in the above-entitled cause to be in the office of the Clerk of the United States Circuit Court of Appeals

for the Ninth Judicial District, pursuant to the appeal theretofore allowed herein and directed to said Court from an order or decree made herein on the 11th day of September, 1916, including the order directing an accounting and referring the matter of the accounting to H. M. Wright, Master in Chancery of this Court, and from the final decree made herein on the 6th day of November, 1922, disallowing and overruling the objections made by J. J. Rauer to the account and report filed herein by H. M. Wright, Master in Chancery, pursuant to the order of September 11th, 1916, and confirming and approving said report, and decreeing that the said J. J. Rauer, defendant, pay to the plaintiff the sums of money in the said decree specified, and include in the said transcript the following proceedings, pleadings and papers on file, to wit:

1. The complaint or bill in said action.
2. The answer of the defendants thereto.
3. Supplement to the bill, and answer.
4. The interlocutory decree therein.
5. Report of the Master and suggestions for judgment.
6. Exceptions of the defendant J. J. Rauer to the Master's Report, and being the exceptions filed with the objections of Defendant Rauer to the Special Master's petition for compensation.
7. Order confirming the report of the Master.
8. Order and decree filed herein September 30, 1922, fixing the compensation and over-

ruling defendants' objections to Master's report, together with opinion of Court.

9. Decree confirming Master's report and giving judgment in favor of the plaintiff in said action against the defendants [315] therein as in said decree specified.
10. Defendant Rauer's petition for appeal from order or decree made herein on the 11th day of September, 1922, including the order directing an accounting and referring the matter of the accounting to H. M. Wright, Master in Chancery of this Court, and from the final decree made herein on the 6th day of November, 1922, disallowing and overruling the objections made by J. J. Rauer to the account and report filed herein by H. M. Wright, Master in Chancery, pursuant to the order of September 11, 1916, and confirming and approving said report, and decreeing that the said J. J. Rauer, defendant, pay to the plaintiff the sums of money in the said decree specified.
11. Defendant's assignment of error on appeal from the said last mentioned orders and decrees.
12. Order allowing appeal from the said orders and decrees and fixing bond on appeal and to stay proceedings.
13. Bond on appeal from said last mentioned order.
14. Citation on appeal, admission and affidavit of service from the said last mentioned order.

15. Statement on appeal.

16. This praecipe.

Said transcript to be prepared as required by law, and the rules of the United States Circuit Court of Appeals on or before the 28 day of August, 1923.

Dated at San Francisco, California, this 17 day of August, 1923.

J. J. RAUER,

Defendant and Appellant Herein.

H. M. ANTHONY and

GRANT & ZIMDARS,

His Solicitors.

Receipt of copy of the above admitted this 18 day of August, 1923.

ED. H. WILLIAMS,

CHARLES S. WHEELER and

CHARLES S. WHEELER, Jr.,

Solicitors for Plaintiff and Respondent.

[Endorsed]: Filed Aug. 20, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[316]

(Title of Court and Cause.)

**Demand for Additions to Transcript as Designated
in Praecipe of Appellant.**

To the Clerk of the Above-entitled Court:

You are hereby requested to include in the transcript of the record in the above-entitled cause, in addition to the papers designated in the praecipe heretofore filed by appellant, the following:

1. Order substituting Geo. J. Hatfield, Trustee, as complainant in the above-entitled action.
2. Order of reference to H. M. Wright as Master in Chancery to take accounting.
3. Order continuing in effect the authority of H. M. Wright as Master of Chancery to head accounting.
4. Report of Master should include portions thereof entitled "Observations on Master's Report."

Dated: August 28, 1923.

E. H. WILLIAMS,

CHARLES S. WHEELER and

CHARLES S. WHEELER, Jr.,

Solicitors for Geo. J. Hatfield, Trustee, etc., Complainant Herein.

Due service and receipt of a copy of the within praecipe on part of plttf. this 28th day of August, 1923, is hereby admitted.

H. M. ANTHONY and

GRANT & ZIMDARS,

Attorneys for Defendants.

[Endorsed]: Filed Aug. 29, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[317]

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing three hundred seventeen (317) pages, numbered from 1 to 317, inclusive, to be a full, true and cor-

rect copy of the record and proceedings in the above-entitled cause as enumerated in the praecipis for records on appeal, as the same remain on file and of record in the above-entitled cause, in the office of the clerk of said court, and that the same constitutes the record on appeal to the United States Circuit Court of Appeals, for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is \$132.90; that said amount was paid by defendant, J. J. Rauer; and that the original citations issued in said cause are hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 30th day of August, A. D. 1923.

[Seal]

WALTER B. MALING,
Clerk United States District Court for the North-
ern District of California. [318]

Citation on Appeal—Dated October 16, 1922.

United States of America,—ss.

The President of the United States, to George H. Hatfield, as Trustee in Bankruptcy of the Estate of A. E. Buckman, Bankrupt, and to Messrs. E. H. Williams, Charles S. Wheeler and Charles S. Wheeler, Jr., His Solicitors and Attorneys, H. M. Wright, A. E. Buckman, William H. Chapman, Fillmore Buckman, J. A. Meadows, Sunset Construction Company, a Corporation, and J. A. Meadows, John McCoy and A. E. Buckman, Trustees of the Defendant, Sunset Construction Company,
GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Southern Division of Northern District of California, in that certain action wherein George H. Hatfield, as Trustee in Bankruptcy, is plaintiff, and the defendants in the said action are A. E. Buckman, J. J. Rauer, William H. Chapman, Fillmore Buckman, J. A. Meadows and Sunset Construction Company, a corporation, and J. A. Meadows, John McCoy and A. E. Buckman, as Trustees of the Sunset Construction Company, a corporation, and in which appeal J. J. Rauer is the appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WM. C. VAN FLEET, United States District Judge for the Northern District of California, this 16th day of October, A. D. 1922.

WM. C. VAN FLEET,
United States Dist. Judge. [319]

United States of America,—ss.

On this 2d day of November, in the year of our Lord one thousand nine hundred and twenty-two, personally appeared before me, Roy E. Clark, the subscriber, a citizen of the United States of America, and the State of California, and over the age of 21 years, and makes oath that he delivered a true copy of the within citation to John McCoy, within named, on the 31st day of October, 1922, in the city and county of San Francisco, State of California.

R. E. CLARK.

Subscribed and sworn to before me at San Francisco, this 2d day of November, A. D. 1922.

[Seal]

CHARLES R. HOLTON,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires Sept. 16, 1926.

Service of copy of the within citation on appeal hereby admitted this 18 day of October, 1922.

CHARLES S. WHEELER and
CHARLES S. WHEELER, Jr.,
ED. H. WILLIAMS,

Attys. for Plaintiff.

H. M. WRIGHT.

(Reserving Objections to Duplicity of Appeal.)

WM. H. CHAPMAN.

[Endorsed]: No. 233—Equity. United States District Court, Southern Division for the Northern District of California. J. J. Rauer, Appellant, vs.

George H. Hatfield, etc., Appellees. Citation on Appeal. Filed Nov. 6, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

Citation on Appeal—Dated December 2, 1922.

United States of America,—ss.

The President of the United States, to George H. Hatfield, as Trustee in Bankruptcy of the Estate of A. E. Buckman, Bankrupt, and to Messrs. E. H. Williams, Charles S. Wheeler and Charles S. Wheeler, Jr., His Solicitors and Attorneys, and A. E. Buckman, William H. Chapman, Fillmore Buckman, J. A. Meadows, Sunset Construction Company, a Corporation, and J. A. Meadows, John McCoy and A. E. Buckman, Trustees of the Defendant, Sunset Construction Company, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the Southern Division United States District Court for the Northern District of California, in that certain action wherein George H. Hatfield, as Trustee in Bankruptcy, is plaintiff, and the defendants in the said action are A. E. Buckman, J. J. Rauer, William H. Chapman, Fillmore Buckman, J. A. Meadows and Sunset Construction Com-

pany, a corporation, and J. A. Meadows, John McCoy and A. E. Buckman, as Trustees of the Sunset Construction Company, a corporation, and in which appeal J. J. Rauer is the appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WM. C. VAN FLEET, United States District Judge for the Northern District of California, this 2d day of December, A. D. 1922.

WM. C. VAN FLEET,

United States District Judge. [320]

United States of America,—ss.

On this 15th day of December, in the year of our Lord one thousand nine hundred and twenty-two, personally served John McCoy, the subscriber, and makes oath that he delivered a true copy of the within citation to John McCoy.

R. E. CLARK.

Subscribed and sworn to before me at San Francisco, Cal., this 4th day of January, A. D. 1923.

[Seal]

CHARLES R. HOLTON,

Notary Public, San Francisco, California.

Receipt of copy of the within citation on appeal hereby admitted this 5th day of December, 1922.

WM. H. CHAPMAN,

E. D. WILLIAMS,

CHARLES S. WHEELER and

CHARLES S. WHEELER, Jr.

By C. A. W.

[Endorsed]: No. 233—Eq. United States District Court, Southern Division for the Northern District of ———. J. J. Rauer, Appellant, vs. George H. Hatfield, etc., et al., Appellees. Citation on Appeal. Filed Jan. 5, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 4091. United States Circuit Court of Appeals for the Ninth Circuit. J. J. Rauer, Appellant, vs. George H. Hatfield, as Trustee in Bankruptcy of the Estate of A. E. Buckman, Bankrupt, and H. M. Wright, A. E. Buckman, William H. Chapman, Fillmore Buckman, J. A. Meadows, Sunset Construction Company, a Corporation, and J. A. Meadows, John McCoy and A. E. Buckman, Trustees of the Defendant, Sunset Construction Company, Appellees, and J. J. Rauer, Appellant, vs. George H. Hatfield, as Trustee in Bankruptcy of the Estate of A. E. Buckman, Bankrupt, and A. E. Buckman, William H. Chapman, Fillmore Buckman, J. A. Meadows, Sunset Construction Company, a Corporation, and J. A. Meadows, John McCoy and A. E. Buckman, Trustees of the Defendant, Sunset Construction Company, Appellees. Transcript of Record. Upon Appeals from the Southern Division of the United States District Court for the Northern District of California, Third Division.

Filed August 31, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

J. J. RAUER,

Appellant,

vs.

GEORGE H. HATFIELD, as Trustee in Bank-
ruptcy of the Estate of A. E. BUCKMAN,
a Bankrupt, H. M. WRIGHT, et al.,
Respondents.

**Order Allowing Time to File Transcript of Record
on Appeal, and to Docket the Said Cause, in
the Matter of Appeal from the Judgment Di-
recting an Accounting and Confirming the Ac-
count of the Referee Made on the 18th day of
November, 1922, and Which Judgment was
Made and Entered in that Certain Action No.
233 in Equity, in the Southern Division of the
United States District Court for the Northern
District of California, in that Certain Action
Entitled George H. Hatfield, as Trustee in
Bankruptcy, vs. A. E. Buckman, et al., De-
fendants; and Extending Time in which to
Prepare the Statement on Appeal in Said
Cause.**

Good cause appearing therefor, it is hereby or-
dered that the return day of the citation on the
above mentioned appeal to the United States Cir-
cuit Court of Appeals for the Ninth Circuit, in
the above-entitled suit, be and the same is hereby

extended to the 31st day of August, 1923, and that the said Rauer, defendant and appellant, may have and he is hereby granted to and including said 31st day of August, 1923, in which to file, in the office of the Clerk of this Court, the transcript of the record on appeal and to docket said cause in this court, and within which time to prepare the statement on appeal in said cause.

Dated this 27th day of August, 1923.

W. H. HUNT,
Circuit Judge.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. J. J. Rauer, Appellant, vs. George H. Hatfield, as Trustee in Bankruptcy of the Estate of A. E. Buckman, a Bankrupt, H. M. Wright, et al., Respondents. Order Allowing Time to File Transcript of Record on Appeal and to Docket the Said Cause, in the Matter of the Appeal from the Judgment Directing an Accounting and Confirming the Account of the Referee, etc. Filed Aug. 28, 1923. F. D. Monekton, Clerk.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

J. J. RAUER,

Appellant,

vs.

GEORGE H. HATFIELD, as Trustee in Bank-
ruptcy of the Estate of A. E. BUCKMAN,
a Bankrupt, H. M. WRIGHT, et al.,
Respondents.

**Order Allowing Time to File Transcript of Record
on Appeal and to Docket Said Cause in the
Matter of the Appeal from the Order Allowing
Appeal from Order Made and Filed in Said
Cause on September 30, 1923, Fixing Compens-
ation of the Master, H. M. Wright, Esq., and
Directing the Payment of the Same by J. J.
Rauer, Which Order was Made in Said Action
No. 233 Equity, in the Southern Division of the
United States District Court for the Northern
District of California.**

Good cause appearing therefor, it is hereby ordered that the return day of the citation on the above mentioned appeal to the United States Circuit Court of Appeals for the Ninth Circuit, in the above-entitled action, be and the same is hereby extended up to and including the 31st day of August, 1923; and that said J. J. Rauer, defendant in said action and appellant herein, may have and he is hereby granted to and including the 31st day

of August, 1923, in which to file in the office of the Clerk of this Court the transcript of the record on appeal and to docket said cause in this court.

Dated this 27th day of August, 1923.

W. H. HUNT,
United States Circuit Judge.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. J. J. Rauer, Appellant, vs. George H. Hatfield, as Trustee in Bankruptcy of the Estate of A. E. Buckman, a Bankrupt, H. M. Wright, et al., Respondents. Order Allowing Time to File Transcript of Record on Appeal and to Docket Said Cause in the Matter of the Appeal from the Order Allowing Appeal * * * and Fixing the Compensation of the Master, etc. Filed Aug. 28, 1923. F. D. Monekton, Clerk.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

J. J. RAUER,

Appellant,

vs.

GEORGE H. HATFIELD, as Trustee in Bankruptcy of the Estate of A. E. BUCKMAN, a Bankrupt, H. M. WRIGHT, et al.,
Respondents.

In the Matter of the Appeal from the Order Allowing Appeal from Order Made and Filed in Said Cause on September 30, 1923, Fixing Compensation of the Master, H. M. Wright, Esq., and Directing the Payment of the Same by J. J. Rauer, Which Order was Made in Said Action No. 233 Equity, in the Southern Division of the United States District Court for the Northern District of California.

In the Matter of the Appeal from the Judgment Directing an Accounting and Confirming the Account of the Referee Made on the 18th Day of November, 1922, and Which Judgment was Made and Entered in that Certain Action No. 233 in Equity, in the Southern Division of the United States District Court for the Northern District of California, in that Certain Action Entitled George H. Hatfield, as Trustee in Bankruptcy, vs. A. E. Buckman, et al., Defendants, and Extending Time in Which to Prepare the Statement on Appeal in Said Cause.

WHEREAS, as above indicated, there are two separate appeals in the above-entitled cause, and, to avoid inclusion of more than one copy of the same paper in the record on appeal,

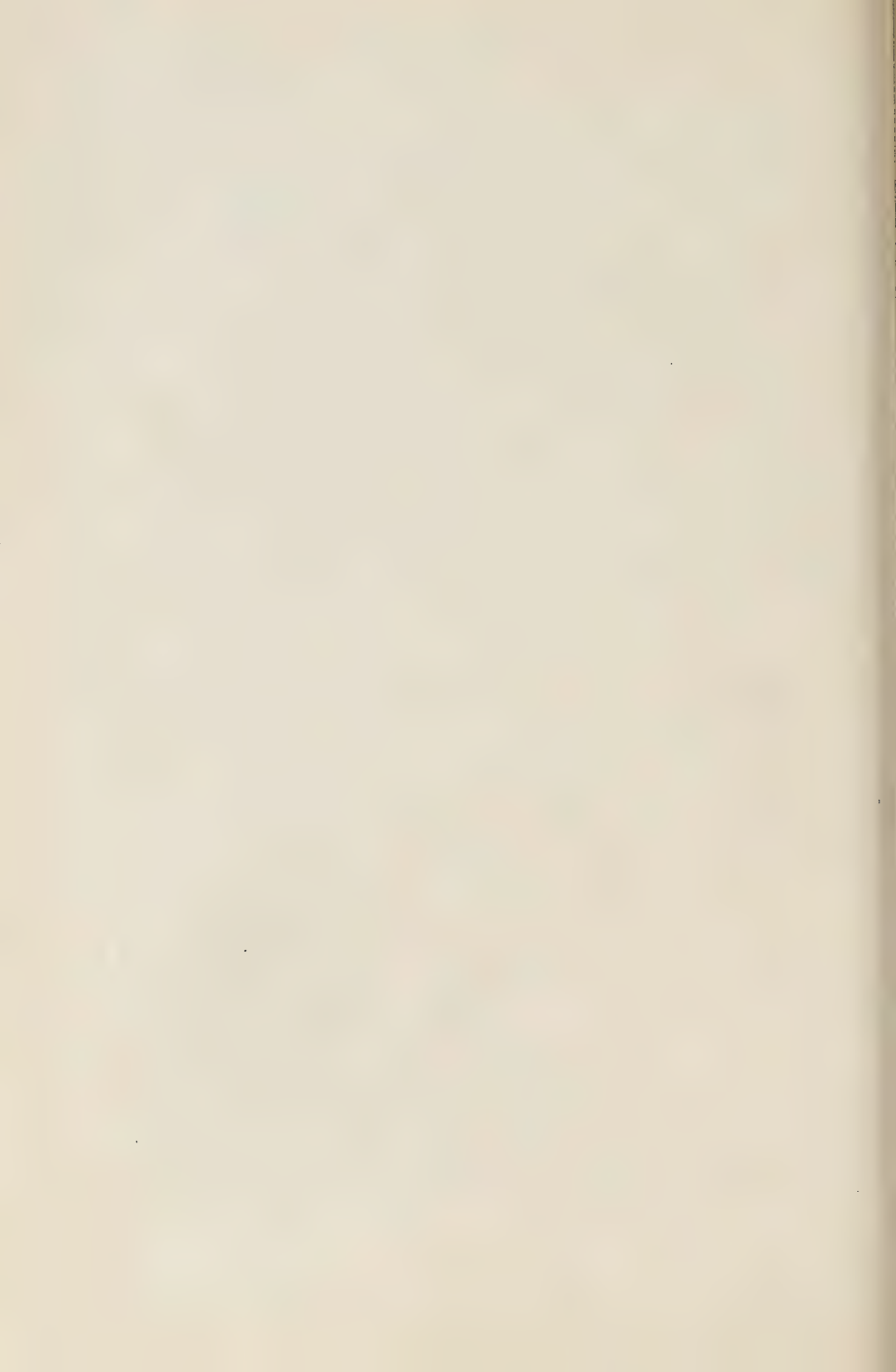
IT IS ORDERED, that the two appeals be heard on one record on appeal, and that the said record shall contain a copy without duplication of every

paper and record provided for by the praecipe in each appeal.

Dated this 28th day of August, 1923.

HUNT,
Circuit Judge.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. J. J. Rauer, Appellant, vs. George H. Hatfield, as Trustee in Bankruptcy of the Estate of A. E. Buckman, a Bankrupt, H. M. Wright, et al., Respondents. Order Consolidating Appeals. Filed Aug. 28, 1923. F. D. Monckton, Clerk. Refiled Aug. 31, 1923. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.



No. 4091

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. J. RAUER,

Appellant,

VS.

GEORGE H. HATFIELD, as trustee in bankruptcy of the estate of A. E. Buckman, bankrupt, and H. M. Wright, et al.,

Appellees,

and

J. J. RAUER,

Appellant,

VS.

GEORGE H. HATFIELD, etc., et al.,

Appellees.

BRIEF FOR APPELLANT.

H. M. ANTHONY,

J. B. ZIMDARS,

WILLIAM GRANT,

Attorneys for Appellant.

No. 4091

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. J. RAUER,

Appellant,

VS.

GEORGE H. HATFIELD, as trustee in bankruptcy of the estate of A. E. Buckman, bankrupt, and H. M. Wright, et al.,

Appellees.

and

J. J. RAUER,

Appellant,

VS.

GEORGE H. HATFIELD, etc., et al.,

Appellees.

BRIEF FOR APPELLANT.

Statement of Facts.

The two appeals here presented by the defendant and appellant Rauer are from two judgments entered against him—one being a judgment in favor of the plaintiff, Hatfield, as trustee of the Estate of A. E. Buckman, a bankrupt, against Rauer for

the sum of \$13,023.19 and interest, and the other judgment is against Rauer for \$1,800.00 and in favor of H. M. Wright, Master in Chancery, as compensation for services in the litigation resulting in the first judgment above referred to.

Very briefly stated, the facts giving rise to the litigation are as follows:

In 1910, and for some years prior thereto, A. E. Buckman was engaged in the business of street contracting in the City and County of San Francisco, and had become largely indebted. In 1910 he caused a corporation to be formed, known as the Sunset Construction Company, and afterwards, in 1911, Buckman organized and caused another corporation to be formed also known as the Sunset Construction Company. This second company was organized because the first company had lost its franchise on account of non-payment of taxes. There was no other reason for the incorporation of the second company in 1911, and the books and property and assets of the old company were turned over to the new company, and it was agreed by the officers of the new company that the certificates of stock issued in the old company should stand and be evidence of ownership of the same number of shares in the new company. The new corporation had a president, secretary and manager and in every way functioned as a corporation. Buckman was the owner of all the shares other than those issued as qualifying

shares to the directors and the corporation was dominated by him.

In 1914, a judgment was obtained against Buckman in the sum of \$15,000.00, being damages for breach of promise of marriage. Shortly after the judgment was obtained, namely, on February 19, 1915, Buckman filed a voluntary petition in bankruptcy, listing as his creditors those who had claims against him arising out of matters other than the transactions with the Sunset Construction Company. None of the creditors of the Sunset Construction Company filed any claims against the bankrupt estate, nor was any notice sent to those who had dealings with the Sunset Construction Company, and a nominal bond in the sum of \$100.00 was given by the trustee elected by the creditors, who were limited, as before stated, to those who had done business with Buckman individually.

In 1911 Rauer, who was engaged in the business of lending money, made advances to the corporation known as the Sunset Construction Company, and continued to advance large sums thereto until after October 27, 1915, the date of the filing of the complaint in this action.

The physical property belonging to and standing in the name of the corporation was of comparatively small value and the business followed by the corporation was the taking of contracts for street work and the completion of the same by the aid of money advanced by different people, and especially by the

defendant, Rauer. At the time of making the advances the lender would take an assignment of the money payable under the contracts by way of security for his loans.

On January 15, 1914, the Sunset Construction Company was indebted to Rauer in the sum of \$20,000.00 for moneys so advanced by him and on that date Buckman, gave Rauer his note, secured by 10,150 shares of the capital stock of the corporation, as additional security for the advances. These shares represented practically all of the shares of stock issued by the corporation, and were evidenced and represented by a certificate which had been issued by the first corporation formed. As before stated, no certificates evidencing shares of stock were issued by the new corporation, it being arranged by the corporation that the certificates of shares of stock in the old corporation should be deemed evidence of ownership of the same number of shares in the new.

Rauer had no personal acquaintance with Buckman prior to 1911 and Rauer knew nothing whatever about the fact of there being two different corporations formed or of any agreement about the certificates of shares of the old corporation being evidence of the ownership of the shares of stock of the new corporation and Rauer had no knowledge or notice of any kind that he was not dealing with a corporation functioning in the usual way.

Rauer continued to make advances to the corporation after the filing by Buckman of his petition in bankruptcy in the same manner that he had made advances to the corporation during the three or four years prior to that time. Rauer had no knowledge that Buckman had filed a petition in bankruptcy and had no knowledge that the filing of a petition by Buckman in bankruptcy at all affected in any wise the Sunset Construction Company, the corporation with whom he was dealing. Rauer presented no claim against the bankrupt estate, nor did he recognize Buckman in any wise as his debtor excepting on the note given by Buckman for an indebtedness of the Sunset Construction Company and which note was secured by a pledge of Buckman of all the shares of stock of the Sunset Construction Company. These shares, which were of no market value, were subsequently sold by Rauer under a pledgee sale for an insignificant sum. Rauer had also taken from the corporation by way of security for advances, a chattel mortgage on some personal property consisting of machinery and the like, and also a mortgage on some real estate belonging to the corporation, and, as before stated, Rauer would take an assignment of contracts at the time he would advance money to the corporation to carry on the work required to be done on the contracts, and collected moneys on the contracts assigned to him as security for the re-payment of said moneys, just as he had been in the habit of doing for years prior

to the filing by Buckman of his voluntary petition in bankruptcy.

Some eight months after the filing of the petition in bankruptcy, the trustee in bankruptcy commenced this action. As we read the complaint, the action proceeds upon the idea that the transfer of the shares of stock by Buckman to Rauer was made for the purpose of delaying and defrauding the creditors of Buckman. The complaint also contains an allegation that Buckman caused the corporation to be formed for the purpose of concealing the identity of said Buckman under the form and legal entity and name of said corporation, and that the organization amounted to nothing more than the placing in a corporate form the capital of said Buckman and his abilities as a general construction contractor. The complaint does not allege that Rauer had any knowledge of the purposes for which Buckman had organized the corporation, and, so far as the allegations of the complaint are concerned, in reference to charging against Rauer, it is limited to the charge that Rauer participated in the transfer made in January, 1914, to him by Buckman of the shares of stock in the corporation, which is alleged to be fraudulent.

It should be added that the Master in Chancery finds that on February 19, 1915, the day upon which Buckman filed his petition in bankruptcy, the corporation was owing to Rauer the sum of \$18,746.22. And thereafter, because of advances made to the

corporation, the corporation became further indebted to Rauer in the sum of \$18,561.54, making in all the sum of \$37,307.76, owing to Rauer for loans made to the corporation, upon the security of the physical property mortgaged as aforesaid, and upon the assignments made to him of moneys payable under contracts for the completion of which Rauer had advanced moneys.

The judgment in the case proceeds upon the theory that the Sunset Construction Company was, in legal effect, none other than Buckman; that on the day the petition in bankruptcy was filed by Buckman, Rauer was a creditor, not of the corporation, but of Buckman, in the sum of \$18,746.22; and that Rauer must account for and pay to the trustee the full amount of all sums collected by Rauer after February 19, 1915 for street work performed by the Sunset Construction Company prior to that date and without regard to whether the moneys so paid to Rauer under the street work contracts were assigned to Rauer prior or subsequent to February 19, 1915 for moneys owing by Sunset Construction Company to Rauer.

And concerning the sums of money advanced by Rauer to the Sunset Construction Company after February 19, 1915, in good faith as found by the Masters and amounting to the sum of \$18,561.54, the Master refuses to have taken into account in any way whatever, and does not even make the suggestion that Rauer present a claim

therefor to the bankrupt estate, which suggestion he does make concerning the \$18,746.22 found by the Master to be owing to Rauer by the Sunset Construction Company on February 19, 1915, and the assets of which bankrupt estate consists of nothing but the claim against Rauer, involved in this action.

Rauer, as mortgagee of the machinery used in the doing of street had rightly taken possession thereof under the terms of the chattel mortgage, and had made use of the machinery and had credited the value of this use against the mortgage indebtedness. The Referee and the final judgment disallow this method of accounting for the value of the use of the machinery and adjudge that Rauer must pay the full amount of the value of this use to the trustee, although the amount of the indebtedness for which the machinery was security was largely in excess of the value of the property mortgaged, after crediting against the same the full amount of the value of the use of the mortgaged property.

There are no assets of any kind pertaining to the bankrupt estate except such as may result from the payment to the trustee by Rauer as the result of this action, and it appears that the personal indebtedness of Buckman, not incurred in any wise in connection with the affairs of the Sunset Construction Company, is over \$100,000.00. The disastrous consequence to Rauer from

such a theory of accounting is, of course, most apparent, and the Master in Chancery spoke most conservatively when he said in his report concerning the application of the above theory:

“There are, of course, difficulties arising out of the fact that the company was never declared a bankrupt; that its creditors have not been scheduled or notified to file their claims, and the defendant Rauer will suffer loss by reason of the fact that he believed himself entitled to deal with the company after Buckman’s bankruptcy as a separate entity, not affected by his bankruptcy. These, however, are matters that concern the correctness of the interlocutory decree only, and so far as Rauer is concerned, I shall hereafter embody a recommendation that he be allowed to prove his claim herein.”

The foregoing facts present the main contentions in the case. The other facts are addressed to some matters of accounting which will arise, assuming that the plaintiff’s construction of the interlocutory decree, is correct.

The transcript also contains a statement of the facts upon which appellant claims the report of the Master should be set aside, on the ground that the Master was disqualified to act judicially in the matter of making his report, and which report was adopted by and confirmed by the judgment.

By an interlocutory decree, the matter of an accounting was referred to the Master. The Master filed his report and, at the same time, filed a petition to be allowed \$5,000.00 for compensation. In this

petition the Master recites that the action is brought by a trustee in bankruptcy and that there were no assets of the estate other than the claim against Rauer. The record shows that unless a judgment is awarded against Rauer, there is no fund out of which the Master can be paid the \$5,000.00 compensation which he asks, and the petition for compensation filed by the Master sets forth that such is the fact.

We do not suggest that the Master was consciously affected by this circumstance in the making of this report finding against Rauer. We simply call attention to the facts and assert that the law absolutely prohibits a man from acting judicially in a matter in which he can be affected financially by the character of the judgment he renders.

There are two appeals here presented on one record by appellant, J. J. Rauer, this procedure being authorized by order of Court (transcript page 426). These appeals are:

FIRST: THE APPEAL FROM AN INTERLOCUTORY DECREE DIRECTING AN ACCOUNTING AND REFERRING THE ACCOUNTING TO H. M. WRIGHT, AS MASTER IN CHANCERY, AND FROM THE FINAL JUDGMENT DISALLOWING APPELLANT RAUER'S OBJECTIONS TO THE REPORT OF THE MASTER AND ENTERING JUDGMENT PURSUANT TO THE REPORT.

SECOND: THE APPEAL FROM THE ORDER OR DECREE ALLOWING TO H. M. WRIGHT, AS MASTER, A CERTAIN SUM OF MONEY FOR COMPENSATION AND DI-

RECTING THE SAME BE PAID BY APPELLANT, J. J. RAUER.

The record is quite lengthy, and to our minds a great part thereof has little or no bearing on the questions involved in these appeals. It shall be our endeavor to present, or call attention in this brief, to all parts of the record essential to a correct determination of the questions involved in the appeal. This purpose may add to the number of pages under this cover but it is hoped it will make for a great saving of time and labor on the part of the Court.

Specifications of wherein the decrees and orders appealed from are alleged to be erroneous.

Appellant contends that the decrees appealed from are erroneous in the following particulars:

As to the specifications wherein the interlocutory decree is alleged to be erroneous—

First. Assuming that the interlocutory decree is construed as adjudging that Rauer conspired with Buckman in a scheme to incorporate the Sunset Construction Company as a means whereby Buckman could defraud his creditors, the decree is erroneous for the following reasons:

(a) There is no evidence whatever to support such a decree.

(b) A decree to the effect above stated is entirely outside of any issue raised by the pleadings.

(c) There was no creditor defrauded.

Second. Assuming that the interlocutory decree is construed as adjudging that the shares of stock of the Sunset Construction Company pledged to Rauer were the property of the plaintiff as trustee of Buckman, the decree is erroneous for the following reasons:

(a) There is no evidence whatever to support such a decree.

(b) Assuming that there is evidence to support the decree that the plaintiff is the owner of the shares of stock, the decree is erroneous in not providing that such ownership in the trustee claiming under Buckman is subject to the lien in favor of Rauer for the sums of money owing to Rauer and for which the shares were pledged by Buckman as security.

As to the specifications wherein the final decree is alleged to be erroneous:

(a) The said decree is erroneous in adopting and ratifying the report of H. M. Wright as master, as the record before the Court before the signing of the said final decree established the fact that the said H. M. Wright would be financially affected by the judgment entered in accordance with his suggestions and recommendations in his report and that he would suffer financial loss if the judgment were entered in favor of the defendant Rauer, and of which fact the said Master, H. M. Wright, was cognizant at the time of the making and of the

submission by him to the Court of his said report which was so adopted and embodied in the final decree.

(b) The said final decree is erroneous in determining that the sums of \$9321.59 and \$3701.60, or any sum of money, was owing at the time of said decree or at the time of the filing of the complaint herein by said Rauer to the plaintiff as trustee of said Buckman, a bankrupt.

(c) The said final decree is erroneous in adopting and confirming the report made by the master and which report proceeds upon the contention that the interlocutory decree determines that Rauer must account to the plaintiff as trustee of Buckman for all transactions with the corporation, the Sunset Construction Company, as if he were a party to the formation and operation of said corporation and for the purpose of defrauding the creditors of Buckman.

(d) The final decree is erroneous in not recognizing and giving effect to the pledgee lien in favor of Rauer in the sums of money in which the shares of stock of the Sunset Construction Company were pledged to him.

(e) The said final decree is erroneous in not giving any effect to the fact that Rauer at all times dealt with the Sunset Construction Company without any knowledge that the said corporation was a cloak by which Buckman should defraud his creditors, if such were the fact.

(f) The said final decree is erroneous in not giving any effect to the findings of the Master that Rauer at all times transacted business with the Sunset Construction Company in good faith and in the full belief that he was authorized to transact business therewith.

(g) The final decree is erroneous in not giving effect to the pledgee sale of the shares of stock pledged by Buckman to Rauer.

(h) The final decree is erroneous in not allowing the right of set-off to Rauer of the amount owing from the Sunset Construction Company to Rauer at the time of the filing of the petition in bankruptcy by Buckman; and the final decree is erroneous in refusing to take into account the transactions between the defendant Rauer and the Sunset Construction Company and of the money advanced to or paid out by Rauer for the Sunset Construction Company, after February 19, 1915, and prior to the making of the interlocutory order or the filing of the complaint.

(i) The final decree is erroneous in adopting the master's report wherein it is stated that the money owing to Rauer at the time of the filing of the petition in bankruptcy by the Sunset Construction Company was \$18,746.32, whereas, in fact, the evidence shows there was a much larger sum owing at said time from said corporation to Rauer.

(j) The final decree is erroneous in adopting the master's report and adjudging that Rauer must

account to plaintiff in the sum of \$4016.20, and which item is the subject of Exception 13 of the Exceptions filed by the defendant Rauer to the final judgment and is set forth on page 405 of the record.

(k) The final decree is erroneous in adopting the master's report in adjudging that Rauer must pay to the trustee in bankruptcy the sum of \$9016.99 for the rental value and use after February 19, 1915, of the equipment and personal property of the Sunset Construction Company mortgaged to Rauer, and which item is the subject of Exception 14 of the final decree found on page 405 of the record.

(l) The final decree is erroneous in adopting the master's report refusing to allow the rental value of the said machinery charged to the defendant Rauer as a credit on the mortgage indebtedness due Rauer and secured by pledge on the said machinery.

(m) The said final decree is erroneous in adopting the master's report in refusing the defendant Rauer the cost of repairing the personal property so used by Rauer and in not allowing the said Rauer to have credit upon his said mortgage indebtedness in the amount of said advances as embraced in Exception 16 to the final judgment to be found on page 407 of the transcript.

(n) The final decree is erroneous in adopting the master's report charging Rauer \$5381.79 as

gross profits received from the contract between the Federal Construction Company and the Sunset Construction Company about January, 1915, which is the subject matter of Exhibit 17 on page 407 of the transcript.

(o) The said final decree is erroneous in adopting the master's report based upon the erroneous construction of the interlocutory decree and which is embraced in Exception 18 of the assignment of errors found on page 408 of the transcript.

(p) The final decree is erroneous in adopting the master's report and decreeing the sum of \$3701.60 on deposit in the matter of the bankrupt estate and belonging to Rauer should be retained by the plaintiff and the payment thereof made to said Rauer by credit upon the indebtedness so adjudged as owing by the said Rauer to the plaintiff, and which is the subject matter of Exception 18, assignments of error, page 408 of transcript.

(q) The final decree is erroneous in finding there is due from the defendant Rauer to the plaintiff trustee the said sum of \$3701.60 now in the possession of the Court and belonging to the defendant Rauer and the sum of \$9321.59, and which is the subject matter of Exception 20, contained on p. 409 of transcript.

And the appellant now specifies the following particulars in which the order allowing compensation to the master, H. M. Wright, is erroneous and from which order an appeal was taken, as appears by the

record, page 379 of transcript; and said order so appealed from is erroneous in the following particulars:

(a) It appears from the said record that the said master, H. M. Wright, was acting judicially in the making of the said report which was adopted by the final judgment in the case, and that the said master was financially interested in the character of said report and was aware at the time of making said report that he would be affected adversely financially by a suggestion or report or judgment in favor of the defendant Rauer; and therefore he should be allowed no compensation, as his services were of no value.

(b) Assuming the Master is entitled to any compensation, the said order is erroneous in not reducing the sum of \$5000 demanded by the said Master for his services in making said report to a sum not to exceed the sum of \$750, and the Court erred in allowing the sum of \$1800 for said services.

ARGUMENT.

FIRST: THE APPEAL FROM AN INTERLOCUTORY DECREE DIRECTING AN ACCOUNTING AND REFERRING THE ACCOUNTING TO H. M. WRIGHT, AS MASTER IN CHANCERY, AND FROM THE FINAL JUDGMENT DISALLOWING APPELLANT RAUER'S OBJECTIONS TO THE REPORT OF THE MASTER AND ENTERING JUDGMENT PURSUANT TO THE REPORT.

The argument in support of this 'first appeal under the foregoing heading will be presented under the following heads:

a. A discussion of the issues presented by the complaint and by the answer; and the interpretation and scope of the interlocutory decree.

b. The objection that the interlocutory order or decree is not sustained by the evidence.

c. Objections to the final judgment disallowing appellant's objections to the report of the Master and the entry of judgment pursuant to the report.

A: A Discussion of the Issues Presented by the Complaint and by the Answer; and the Interpretation and scope of the Interlocutory Decree.

That the Court may appreciate the significance of the evidence and the pleadings as bearing upon the construction of the decree, it is perhaps best to state at the outset the contention of the defendant Rauer as to the meaning of the interlocutory decree, and then the contention of the counsel for appellees as to its construction, and which latter construction was adopted by the Master. It should be added that if the construction contended for by defendant Rauer is upheld, concededly no judgment would pass against him upon an accounting. On the other hand, if the construction sought by plaintiff is correct, there are exceptions to the specific findings in the Master's report, which findings appellant claims are entirely unsustained by the evidence.

The contention of the defendant Rauer is that the action was brought to have it declared that the trustee in bankruptcy was the owner of all the shares of

stock in the Sunset Construction Company, a corporation, on the ground that all the shares (excepting shares to qualify directors) had been issued to A. E. Buckman, and that the transfer by Buckman to Rauer of these shares was done to hinder and delay the creditors of Buckman and hence the transfer was void; that the plaintiff as the trustee in bankruptcy of A. E. Buckman as the owner of all the shares of stock in the corporation, was entitled to an accounting of all transactions between Rauer and the corporation. It is the contention of the defendant Rauer that the pleadings and the decree recognized the existence of the corporation, the Sunset Construction Company, referred to in the complaint, which is the Sunset Construction Company which was organized on the 12th day of December, 1911.

The position taken by the plaintiff is that the litigation did not proceed to determine the ownership of the shares of stock referred to in the complaint and that the shares of stock legally had no existence, and that an accounting should be had between Rauer and the trustee in bankruptcy as if there were no corporation Sunset Construction Company, and as if Buckman, the bankrupt, and no one else was transacting business with Rauer.

With this brief statement of the diverse views of the plaintiff and defendant, Rauer, as to the purposes of the action and the meaning of the decree, we will proceed and present our argument as to which interpretation is the correct one.

A decree of a Court, like any other writing, should be interpreted in view of the circumstances leading to its making.

“The rule for construction of ambiguous judgments is clearly stated by the Supreme Court of Kansas in the following language:

‘Wherever the entry of a judgment is so obscure as not to clearly express the exact determination of the Court, reference may be had to the pleadings and other proceedings; and if, with the light thus thrown upon such entry, its obscurity is dispelled and its intended signification made apparent, the judgment will be upheld and carried into effect in the same manner as though its meaning and intent were made clear and manifest by its own terms’ ” * * *

(Black on Judgments, 2nd Ed. Vol. 1, Sec. 123, p. 179.)

The only matters that legally could have been in the mind of the Court at the time the decree was made, or which should have at all affected the making thereof, are the following:

First. The pleadings before the Court, consisting of the complaint and the answer.

Second. The evidence that was introduced by the parties, and the admissions made by the parties during the trial, and the remarks of counsel and of the Court during the hearing.

Third. The abstract propositions of recognized law, governing the determination of the issues as presented by the pleadings and by the evidence and upon which the interlocutory decree was based.

We will therefore discuss in the foregoing order these matters which alone could have entered into

the mind of the Court at the time of the making of the decree, or could have been the basis thereof.

FIRST: THE PLEADINGS BEFORE THE COURT, CONSISTING OF THE COMPLAINT AND THE ANSWER.

The pleadings consist of the bill in equity and the answer thereto.

The complaint alleges in paragraphs I and II the formal allegations setting out that on the 19th day of February, 1915, the defendant, A. E. Buckman, filed his voluntary petition in bankruptcy, and on the same day was adjudged a bankrupt. The remainder of the complaint is as follows:

Paragraph III. That defendant Sunset Construction Company was organized as a corporation under the laws of the State of California, on the 12th day of December, 1911; that said corporation was formed and organized by defendant, A. E. Buckman, for the purpose of carrying on a general contracting and construction business. That said corporation was formed and organized as a cover for the activities and operations of said A. E. Buckman, and for the purpose of concealing the identity of said A. E. Buckman under the form and legal entity and name of said corporation. That said A. E. Buckman immediately became the owner of all of the outstanding, subscribed shares of the capital stock of said corporation, with the exception of two shares issued, one each, to defendant Wm. H. Chapman, and one J. Maury, for the purpose of incorporation, and said A. E. Buckman ever since has owned all of said outstanding subscribed capital stock, and ever since has completely owned, operated

and managed said corporation for his sole benefit. That the organization and formation of said corporation amounted to nothing more, and has amounted to nothing more, than the placing in a corporate form of the capital of said Buckman and his abilities as a general construction contractor.

Paragraph IV. That said defendant, Wm. H. Chapman, is and has been since the formation of said Sunset Construction Company, the President thereof, and defendant, Filmore Buckman, is and has been since the formation of said Corporation the Secretary thereof.

Paragraph V. That in January, 1914, defendant, A. E. Buckman, delivered and transferred to defendant J. J. Rauer all of the capital of said corporation, the Sunset Construction Company, owned by said A. E. Buckman; that said delivery and transfer was without consideration and was made by said A. E. Buckman in contemplation of insolvency, and left said Buckman without sufficient funds or property to meet his debts and obligations then due and owing, and was made with intent to hinder, delay and defraud the creditors of said A. E. Buckman and said creditors were thereby hindered, delayed and defrauded.

Paragraph VI. That at some time subsequent to January, 1914, the exact date of which is unknown to plaintiff, said defendant J. J. Rauer delivered and transferred to defendant John Doe Meadows the shares of said capital stock delivered and transferred to said Rauer by said A. E. Buckman, as hereinbefore alleged. That said transfer from defendant A. E. Buckman to defendant Rauer, and from defendant Rauer to defendant Meadows was made as the result of a conspiracy and agreement between defendants A. E. Buckman, Rauer, Chapman, Filmore Buckman, and Meadows to hinder, delay and defraud the creditors of defendant

A. E. Buckman and to withhold from them the shares of the capital stock of said Sunset Construction Company owned by said A. E. Buckman, and to retain for themselves the management, operation, benefits and profits of said corporation. That neither said Rauer nor said Meadows paid or gave any consideration whatsoever for said shares, but accepted said shares with intent to aid and abet in hindering, delaying and defrauding the creditors of said A. E. Buckman, and with full knowledge of the intent of said A. E. Buckman to hinder, delay and defraud his creditors. That said Meadows now holds said shares upon a secret trust for the benefit of said defendants A. E. Buckman, J. J. Rauer, Wm. H. Chapman, Filmore Buckman and himself. That said A. E. Buckman, J. J. Rauer, Wm. H. Chapman, Filmore Buckman and John Doe are now, and ever since January, 1914, have been operating and carrying on said corporation and its business for the benefit of each of them and receiving the profits thereof.

Paragraph VII. That the estate in Bankruptcy of A. E. Buckman, bankrupt, is insufficient to pay or satisfy the claims against said estate, unless said shares of the capital stock of the Sunset Construction Company, and the assets of said corporation be subjected to the payment of said claims and considered as part of said estate in bankruptcy. That the verified schedule of said bankrupt filed with his said petition in bankruptcy discloses unsecured debts and obligations amounting to a sum in excess of \$150,000.00 to meet which there are no assets of said estate.

Wherefore, plaintiff prays:

1. That he be declared to be the owner, as trustee in bankruptcy of A. E. Buckman, of said shares of the capital stock of the Sunset Construction Company.

2. That it be decreed that the attempted transfer of said shares from said A. E. Buckman to defendant J. J. Rauer, and from said Rauer to said defendant John Doe Meadows be declared null and void and of no force or effect.

3. That said defendants A. E. Buckman, Rauer, Chapman, Filmore Buckman and John Doe Meadows be directed to deliver to plaintiff said shares and the assets, properties, books, contracts of said Sunset Construction Company, and the management and control thereof.

4. That an accounting be had from said defendants of the assets and profits of said corporation since the month of January, 1914.

5. For such other and further relief as may be proper and equitable, and for costs herein. (Trans. pp. 3 to 7.)

The answer to the bill in equity, speaking broadly, denies all matters alleged in the complaint as a cause of action, and then sets up affirmatively:

“Defendants allege that the facts concerning the disposition of any shares of stock owned or controlled by the defendant, A. E. Buckman, were as follows:

On the 15th day of January, 1914, the Sunset Construction Company was indebted to the defendant, J. J. Rauer, in the sum of \$20,000.00 for and on account of the moneys loaned by said defendant, J. J. Rauer, to the said Sunset Construction Company, and for the better protection and security of said J. J. Rauer for said sum of money so loaned, as aforesaid, the defendant, A. E. Buckman pledged to the said J. J. Rauer, 10,150 shares of the capital stock of the said Sunset Construction Company on said 15th day of January, 1914; thereafter and on the 12th day of August, 1914, the said defendant J. J. Rauer sold said 10,150 shares of the capital

stock of the Sunset Construction Company to satisfy in part the indebtedness to him of the Sunset Construction Company and said stock was sold for the sum of \$50.00 to H. Wehrle, and thereafter the said H. Wehrle sold and transferred said 10,150 shares of stock to the defendant J. A. Meadows, sued herein as defendant, John Doe Meadows, and said J. A. Meadows ever since the sale to him of said shares of stock has been the owner and holder thereof." (Trans. pp. 8 and 9.)

The answer then alleges various transactions between Rauer and the Sunset Construction Company, setting out that the first transaction commenced on the 9th day of March, 1911, and setting forth somewhat in detail the several accountings had between Rauer and the Sunset Construction Company, and also setting up that on the 16th day of June, 1914, the Sunset Construction Company by resolution of its Board of Directors thereunto duly authorized, gave H. Wehrle a personal property mortgage covering all the personal property of the Sunset Construction Company to secure the payment of a promissory note dated said 16th day of June, 1914, for the sum of \$5,000.00, and to cover further advances, and said personal property mortgage was duly acknowledged by said Sunset Construction Company on the 16th day of June, 1914, and said personal property mortgage was accompanied or had attached thereto an affidavit of all the parties thereto to the effect that it was made in good faith and without any design to hinder, delay or defraud creditors, and that said personal property mortgage was

recorded on the 3rd day of July, 1914, in the office of the County Recorder of the City and County of San Francisco, State of California, in Liber 70 of Personal Property Mortgages, at page 388. And that on the 18th day of June, 1914, the said H. Wehrle advanced to the said Sunset Construction Company the sum of \$10,000, which sum was secured by the aforesaid personal property mortgage under the terms and conditions thereof. That the personal property mentioned in the aforesaid personal property mortgage is of the market value of \$5,000.00, or thereabouts, and that said Sunset Construction Company had no other property at the date of the filing of the bill herein, and other than its open book accounts and interests in contracts, said corporation had no other property for a long time prior to the filing of the bill herein, and the said shares of stock of said Sunset Construction Company had no market value at the time of the sale thereof by the said J. J. Rauer to foreclose the pledge thereof, as aforesaid.

Counsel for plaintiff in the briefs in the lower Court placed great stress upon the closing paragraph of allegation VI of the complaint, which is as follows:

“That said A. E. Buckman, J. J. Rauer, Wm. H. Chapman, Filmore Buckman, and John Doe Meadows are now, and ever since *January 1914*, have been operating and carrying on said corporation and its business for the benefit of each of them and receiving the profits thereof.”

Counsel contends that this paragraph is equivalent to an allegation that there was no corporation, and that Rauer is a party to the fraudulent scheme to make use of the so-called corporation as a mask whereby Buckman can cheat and defraud Buckman's creditors.

We first call attention to the fact that nobody else than these men named in the paragraph had any connection with the corporation as stockholders, directors, officers, pledgees, creditors, or otherwise, and we inquire to whom else should any profits arising from the operation of the corporation go, or who other than some of these men should carry on the affairs of the corporation. The corporation had no creditors other than Rauer, which is probably explainable by the fact shown by the record and to which attention will hereafter be called, that the large sums owing to Rauer by the corporation was used to pay the obligations incurred by the corporation.

We wish to stress particularly the following facts:

That the complaint alleges that the corporation was formed by Buckman in 1911 as a cloak "for his activities". There is no suggestion in the complaint that Rauer even knew Buckman prior to January, 1914, much less that he conspired with Buckman to form a corporation on the 12th day of December, 1911; and it will be observed that the date

January, 1914, set out in paragraph V of the complaint as the date at which Rauer is alleged to be carrying on the business of said corporation with Buckman and the others, is the date at which in the complaint Rauer is charged to have fraudulently purchased the shares of stock without consideration from Buckman in order to defraud the creditors of Buckman.

If these men were guilty of a premeditated fraud, how can one account for the fact that Rauer is the lone creditor of the corporation, and this to the sum of over \$37,000? In the name of common sense, why should Rauer engage in such a transaction? As the transcript shows, no evidence was introduced in support of such a theory of the complaint, and fraud is never presumed. The evidence shows that the Sunset Construction Company had officers—a president, secretary, and board of directors, and in all the transactions between Rauer and the corporation, Rauer was acting on one side, and the corporation acting through its officials on the other side. Resolutions were regularly adopted and presented to Rauer, showing the officers' authority to act for the corporation in its dealings with him. Rauer had no knowledge that the corporation was not authorized to function, or that its transactions were otherwise than perfectly legal, and as found by the Master, Rauer fully believed that he was "entitled to deal with the company after Buckman's bankruptcy as a separate entity not affected by his

bankruptcy.” (Master’s Report, page 63 Transcript.)

The only fraud charged against Rauer in the complaint is in paragraphs V and VI in reference to the acquisition of the shares of stock.

And we now set out the interlocutory decree:

“This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz.:

1. That A. E. Buckman at all times, and up to and on the 19th day of February, 1915, was the owner of all the issued and outstanding capital stock of the Sunset Construction Company, a corporation, and that on said last mentioned day said stock vested in and became, and now is, the property of R. Cords, Jr., as trustee of the estate of A. E. Buckman, bankrupt.

2. That A. E. Buckman at all times, and up to and on the 19th day of February, 1915, was the owner of the Sunset Construction Company, a corporation, and all of the property, books, and records of said company and that on said last mentioned day said company, property, books and records vested in and became, and now are, the property of R. Cords, Jr., as trustee of the estate of A. E. Buckman, bankrupt, and that said property be held by said Cords pending an accounting between said company and defendants A. E. Buckman, J. J. Rauer, Filmore Buckman and Wm. H. Chapman.

3. That defendants A. E. Buckman, J. J. Rauer, Filmore Buckman, and Wm. H. Chapman severally account for all moneys or property received by them from, or advanced by them to, defendant Sunset Construction Com-

pany since the 12th day of December, 1911, whether such transactions were made in the names of third persons or in the names of said parties for the purpose of determining what claims, if any, exist between said company and said persons.

4. That for the purpose of taking said above-mentioned accounting said cause be referred to H. M. Wright, Master in Chancery of this Court, to take and examine said account and report thereon to this Court.

Dated, September 11th, 1916.

Wm. C. Van Fleet,
Judge of the District Court of the
United States for the Northern
District of California."

(Tr. pp. 15 and 16.)

We will next discuss the second matter which affected the Court in the making of the interlocutory order.

SECOND: THE EVIDENCE THAT WAS INTRODUCED BY THE PARTIES, AND THE ADMISSIONS MADE BY THE PARTIES DURING THE TRIAL, AND THE REMARKS OF COUNSEL AND OF THE COURT DURING THE HEARING.

This evidence is directed simply and solely to the question of the ownership of the shares of stock pledged by Buckman to Rauer, and by Rauer sold under the pledge to Meadows, the trustee claiming these shares should pass to the estate, and the defendants insisting that the sale was made under a valid pledge. (Transcript pages 209-239.)

It is also claimed by the plaintiff that there had been no valid pledge of the shares to Rauer or sale

to Meadows because there had been an earlier corporation, called the Sunset Construction Company, composed of the same individuals, composing the Sunset Construction Company which was incorporated on the 12th day of December, 1911, and that the directors of the earlier corporation failed to pay the license tax and the corporation's rights to do business lapsed, and the officers of the second corporation did not issue new certificates of stock in the second corporation, but proceeded upon the idea that the certificates of stock issued in the first corporation might be deemed and regarded as the issues of stock in the second corporation. It may be added that the second corporation agreed that the holders of stock in the first corporation should hold the same number of shares of stock in the second corporation. (Transcript pages 224-5.) The certificates in the new corporation, duplicating the certificates in the old, were actually prepared and signed by the officers of the new corporation, but were not torn out of the stockholders or in physical form delivered to the holders of the stock. On page 224 transcript, W. H. Chapman, the attorney for the corporation and president thereof at the time, makes this explanation of the transaction:

“Originally, the corporation forfeited its charter sometime in December for non-payment of taxes, and we contemplated, when we incorporated, the issuance of the certificates shown in the books that are filled out but not signed by the secretary, to be issued in the place of the old certificates, and the same number of shares issued to the directors of the defunct Sunset

Construction Company as trustees for the corporation, the 10,000 and odd shares; we afterwards learned that what we had done in re-incorporating was practically a redemption of the right to act, and we went ahead then, just as though there had been no forfeiture, and considered the old certificates as valid certificates of the corporation.

We did not issue any new certificates; only in lieu of cancelled certificates of the old corporation, all of these that are in here were to take the place of the old certificates, but they are still here, the same number of shares."

There is no suggestion of any kind that Rauer knew anything whatever about the matter of the issuance of the shares of stock in the second corporation, or that he ever knew there was a first and second corporation, or that he ever knew anything of the interior workings of the corporations, as to who were the stockholders thereof, or who were the directors thereof, or when the corporations were organized, or anything at all about their doings, beyond the fact that there was a concern doing business as a corporation, of which Mr. Buckman and the other directors were the representatives, and that Buckman was the owner of shares of stock in that corporation, which had been pledged by him to Rauer.

His dealings with the corporation were only as a man who lent money to the corporation, taking as security therefor in one instance a pledge of the shares of the corporation owned by Buckman, and in another instance a mortgage on personal prop-

erty owned by the corporation, and when advancing money on specific contracts, taking assignments of the same by way of security for the moneys so advanced. There was no evidence presented at the trial before the District Court except on the issue as to who owned these shares of stock, pledged by Buckman to Rauer, and as to whether the plaintiff was entitled to recover those shares of stock as belonging to the estate of the insolvent Buckman; and in connection with this matter, we call attention to the transcript on page 231, from which we quote:

“Mr. RAUER testified:

I am the man to whom Mr. Buckman pledged 10,150 shares of the stock of the Sunset Construction Company. That pledge was made in January, 1914 by a pledge note and the stock was then delivered to me. I have here a copy of that note.

The COURT. All you are litigating now is the ownership of the stock, I suppose?

Mr. LANE. The ownership of the stock, and it is my contention that there has never been any valid pledge of this stock.”

(Mr. Lane was the attorney for the plaintiff trustee.)

Close at the end of the testimony at the trial, and just prior to the testimony of Rauer as to the sale of the pledged stock, and which testimony was the only evidence upon which the interlocutory decree was based (transcript page 233), the Court expresses very tersely his understanding

of the proposition that is at issue in the case. We quote the Court:

“The COURT. I am not going into an accounting of that kind. *My theory of this case is that if this stock belongs to Buckman, a decree will go to that effect, and an accounting will be had; otherwise, I do not care anything about it.* He admits that he (Rauer) simply holds it as a pledge that it never was sold to him, that it was simply assigned to him. *The only question is, whose property was it? If it was Buckman's property, they will be entitled to a decree, and then an accounting as to the present rights will be had before a master.*”

(This is before Rauer's testimony as to the sale of the stock by him.)

It is submitted that the decision of the Court that the shares of stock pledged by Buckman to Rauer, and by Rauer sold to Meadows, belonged to Buckman, and therefore passed to the trustee in bankruptcy at the time of the adjudication of Buckman a bankrupt, is not based on the ground there was any fraud in the matter of the pledge of these shares by Buckman to Rauer.

“The COURT. All you are litigating now is the ownership of this stock, I suppose?”

The complaint in the case, as we have said before, proceeded upon the idea that Buckman was the owner of these shares, and that he made a transfer of these shares for the purpose of defrauding his creditors. The evidence shows that the shares were pledged to Rauer some time in January, 1914. They were sold under a pledgee sale August 12, 1914.

There is not a scintilla of evidence in the record that the pledge was not for value as testified to by the parties, and it is not reasonable to assume that the Court found contrary to the evidence. In other words, there is no evidence whatever to support the allegations of the complaint that the sale of these shares was made by Buckman in January, 1914, to defraud his creditors in the bankruptcy proceedings, which were instituted shortly after the judgment against Buckman for breach of promise of marriage, referred to later on in this record, and the language of the interlocutory decree in this respect is quite significant. The decree does not find that the sale made by Buckman of the shares of stock referred to in the complaint was fraudulent and therefore should be set aside. The decree simply adjudicates that the trustee in bankruptcy of Buckman is the owner of these shares. The transaction between Buckman and Rauer in relation to the shares in January, 1914, was a pledge and not a sale, and concerning the fairness of the transaction the evidence does not admit of a doubt, and the decree does not find any fraud. The decree simply adjudicates that the trustee is the owner of the shares. Such a judgment is fully consistent with the validity of the pledgee interest in Rauer. It is true the judgment does not give recognition or effect to the pledgee sale divesting Buckman of all ownership in the shares. Whether recognition was denied on the ground in the opinion of the Court a valid pledgee sale could not be made because of

irregularity in the issuance of the certificates evidencing the ownership of the shares or because the sale was made for such a trivial sum that the Court was disposed to view it as void for lack of notice or otherwise does not appear.

If the pledgee sale be regarded as void then of necessity the pledgee interest in Rauer must be given effect, and the amount of the pledge indebtedness must be given priority to any ownership by the trustee.

Attention is again called to the fact that the complaint only asks for an accounting from January 1914, the date alleged in the complaint as the date of the alleged fraudulent sale of the shares of stock by Buckman to Rauer.

It is significant that the Court in its decree does not find even in the most distant way that Rauer was a party to any fraud. In this case no certificates of stock in the new corporation were actually delivered to Buckman, and this upon the understanding testified to by Mr. Chapman that the shares of stock issued in the old corporation should stand as the shares of stock in the new, and because of this non-issue it was contended that the so-called pledge sale of Rauer's did not transfer Buckman's shares to the purchaser, and the title remained in Buckman, subject to an equitable pledge in favor of Rauer. This is in accordance with the theory advanced by Mr. Lane that there was no legal pledge of the shares of stock. No wrongful intent can be ascribed to Rauer to take

over these shares of stock belonging to Buckman, and thereby obtain a value in these shares which would defraud the creditors of Buckman from participating in that value. The record is peculiarly significant in showing that the entire controversy, so far as the evidence shows, was directed to the ownership of these shares, which were deemed of value, and being so deemed it was sought by the trustee to have them declared the property of the bankrupt estate.

It may be added that the evidence on the accounting shows, and the Master so in effect finds, that these shares were absolutely of no value, so far at least as the interest of the corporation or the trustee is concerned.

We wish to emphasize that Rauer is before this court with clean hands. There is no question of his good faith or his belief that he had the right to deal with the Sunset Construction Company, as a separate entity, and that he was not a party or privy in any wise to any scheme, if such there were, on the part of A. E. Buckman to use the Sunset Construction Company as a means whereby Buckman might defraud his creditors. The fact found by the Master that Rauer is a creditor of the Sunset Construction Company in a large amount, conclusively establishes this fact, aside from all the other evidence.

While fraud will never be presumed (and there was no evidence whatever showing Rauer to be guilty of any fraud), yet we do not have to rely

upon any presumption. The Master on transcript page 63, speaking of the judgment he suggests should be rendered against defendant Rauer says:

“There are, of course, difficulties arising out of the fact that the Company was never declared a bankrupt; that its creditors have not been scheduled or notified to file their claims, and the defendant Rauer will suffer loss by reason of the fact that he believed himself entitled to deal with the company after Buckman’s bankruptcy as a separate entity, not affected by his bankruptcy. These, however, are matters that concern the correctness of the interlocutory decree only, and so far as Rauer is concerned, I shall hereafter embody a recommendation that he be allowed to prove his claim herein.”

In view of the fact that there are no assets of any kind pertaining to the estate of the bankrupt, except only this alleged claim against Rauer, and in view of the fact that there are claims against the bankrupt estate, which including the judgment for damages for breach of promise of marriage against Buckman, amount to considerably over \$100,000.00, this recommendation of the Master that Rauer be allowed to file a claim against the bankrupt estate of A. E. Buckman personally, is most illusive. If it were not a judicial utterance we would say it was ironical.

But, we ask, what creditors of Buckman have been injured by Rauer’s dealings, or have a right to complain? For theoretically at least it is only to the extent that they were injured by the whole sum by Rauer’s dealings that the court should be

asked to afford relief; and this brings us to the question of who are these creditors who are claimed to have been injured by Rauer, and to what extent have they been injured?

This action is brought by a trustee in bankruptcy and, of course, he simply represents the creditors. All of the creditors who filed their claims in the bankruptcy court, were creditors in the transactions with Buckman personally, and not arising out of any business matters with the corporation, the Sunset Construction Company, and all claims filed in the bankruptcy court arose out of transactions prior to the formation of either Sunset Construction Company No. 1 or Sunset Construction Company No. 2, except only the claim of the woman who obtained a judgment against Buckman for \$15,000.00 for breach of promise of marriage. This claim was obtained in 1914, and this judgment for breach of promise of marriage was the cause which led to the filing by Buckman of his petition in bankruptcy.

The record shows, and it is so found, that Rauer knew nothing about the fact that there were two Sunset Construction Companies. He knew nothing whatever about the fact, if it be a fact, that Buckman organized the corporation for the purpose of a cloak under which to do business.

No creditor of the Sunset Construction Company, much less Rauer, ever filed a claim in said bankruptcy, nor was any creditor of the Sunset Construction Company scheduled as a creditor of

Buckman personally, or notified to present any claim against the bankrupt estate of Buckman.

The evidence shows that the Sunset Construction Company had a complete organization, a president and a secretary, and that the secretary was very active in its affairs; that it had books of account, and that all transactions between Rauer and the Sunset Construction Company recognized the existence of the Sunset Construction Company, and in no wise did Buckman have any personal dealings with Rauer in connection with the affairs between Rauer and the Sunset Construction Company; and the accounts upon which the Master makes his report are accounts shown on the books of Rauer and the books of the Sunset Construction Company, to be transactions between Rauer on the one side and the Sunset Construction Company on the other. There can be no question that Rauer in his dealings with the Sunset Construction Company, instead of impairing the fund and the property, out of which any creditors of Buckman might have their demands satisfied, enlarged the same. And it cannot reasonably be contended that there is any basis for any assertion that Rauer in his dealings with the Sunset Construction Company attempted to defraud anybody, or that as a matter of fact his dealings with the Sunset Construction Company impaired the resources of Buckman personally to pay any debts that Buckman personally owed, as the Master found that on February 19, 1915, the Sunset Con-

struction Company was justly indebted to Rauer in the sums of \$18,746.22 and later, as we have seen, the Sunset Construction Company became further indebted to Rauer in the additional amount of \$18,561.54, thus making a total of \$37,307.76.

This action is being prosecuted by the assignee of Buckman. In view of the fact that Rauer in good faith dealt with the Sunset Construction Company as a separate entity, and was not a party to any fraud, if any existed on the part of Buckman, the plaintiff as the assignee of Buckman is entitled to no greater rights as against Rauer than Buckman would be entitled to.

Let us concede for the sake of argument that there was no Sunset Construction Company, as a matter of fact: that it had not even filed articles of incorporation. Nevertheless, Buckman in his dealings with Rauer held out that there was such a corporation as the Sunset Construction Company. Rauer believing such to be the case, had transactions with the supposed corporation, the Sunset Construction Company.

Under the foregoing circumstances, Buckman would be estopped from saying as against Rauer that there was no Sunset Construction Company, and that the machinery and assets which Buckman said belonged to the Sunset Construction Company was the property of Buckman personally. Surely, Buckman would be so estopped, and if Buckman would be estopped, wherein does Buckman's as-

signee have any greater rights or stand in a different position?

Let us assume for sake of argument, that the Sunset Construction Company was simply an agent or instrument by which Buckman as an undisclosed principal transacted business.

Rauer had no knowledge of this relation of principal and agent, and had an absolute right to an accounting against the agent as if the agent were in fact a principal.

If a creditor discovers that a person with whom he has been transacting business as a principal is in fact an agent, the law allows the creditor at his option to proceed against the hitherto undiscovered principal.

Full credit must be given to the creditor for all transactions with the agent prior to the discovery of the undisclosed principal.

Basically, the plaintiff's cause of action is predicated upon the theory that the creditors whom he represents have been wronged by Rauer in that Rauer has depleted the fund to which the creditors had the right to look for payment. When it is borne in mind that the claims of these creditors arose prior to the formation of the Sunset Construction Company and prior to the advent of Rauer on the scene in connection with the Sunset Construction Company, and that Rauer by virtue of his dealings with the Sunset Construction Com-

pany added to its property to the extent of \$37,307.76, in excess of anything he received from the Sunset Construction Company, it follows that Rauer, instead of depleting the fund has contributed most largely thereto, and there is no basis for the claim of these creditors.

It will be borne in mind that in the evidence introduced before the Court, upon which the interlocutory decree is based, it was shown that Buckman had pledged equitably, if not legally, with Rauer 10,050 shares of the capital stock of the Sunset Construction Company as security for the payment of a promissory note of \$20,000.00, and no attack is made upon the fact that these shares of Buckman were pledged to Rauer for money of that amount advanced by Rauer. It appeared afterwards that Rauer made a sale of these shares of stock under his right as pledgee for \$50.00. By this sale the Court says in effect the legal title to these shares, which was in Buckman, was not transferred, but of the validity of the pledge itself there is no question. (And it might also be remarked that the Sunset Construction Company being largely indebted at that time the stock had but a nominal value.)

If the pledgee sale was ineffective, then the title of Buckman did not pass, but his interest in the stock, of course, is subject to the lien for the sum of money for which the shares were pledged, and no right could pass to the assignee in bankruptcy,

except the right of Buckman. Therefore the pledgee of these shares is entitled to the payment of the indebtedness for which the shares were pledged before any part of the value of these shares could pass to the assignee of Buckman.

There being a pledge, the plaintiff, as trustee of Buckman, would not be entitled to the shares, whether there was a pledgee sale or not, except subject to the lien for which the shares were pledged. The report of the Master does not recognize this pledge.

We have now taken up the pleadings, and we have taken up the evidence, and we will now take up the third head, which is:

THIRD: THE ABSTRACT PROPOSITIONS OF RECOGNIZED LAW, GOVERNING THE DETERMINATION OF THE ISSUES AS PRESENTED BY THE PLEADINGS AND BY THE EVIDENCE, AND UPON WHICH THE INTERLOCUTORY DECREE WAS BASED.

A. The fact that the certificates of stock were not physically issued and delivered by the second corporation in accordance with the rights of the stockholders to have them issued, did not in any wise affect the status of the persons entitled to the shares of stock as stockholders in the corporation.

B. The Sunset Construction Company, being apparently a corporation transacting business was for all purposes a *de facto* corporation, and no inquiry is open as to whether the corporation had complied with all forms prescribed by the statute.

C. The decree legally could not go beyond the issues raised by the pleadings, and the

only issue raised by the pleadings or alluded to in the evidence was the question of the ownership of the shares of stock.

D. The interlocutory decree is not sustained by the evidence if plaintiff's construction thereof be correct.

- A. **The fact that the Certificates of Stock were not Physically Issued and Delivered by the Second Corporation in Accordance with the Rights of the Stockholders to have them Issued, did not in any wise affect the Status of the Persons Entitled to the Shares of Stock, as Stockholders in the Corporation.**

We quote the following California cases:

"To constitute the subscribers to an agreement for the formation of a corporation stockholders of the corporation, it is not necessary that the certificates of stock should have issued to them."

San Joaquin Land etc. Co. v. Beecher, 101 Cal. 70; 35 Pac. 349.

"The issuance of a certificate of corporate stock is not a necessary preliminary to the ownership or assessability of such stock."

Pacific Fruit Co. v. Coon, 107 Cal. 447, 40 Pac. 542.

"Issuance of certificate of stock for stock subscribed and paid for is not necessary to constitute one a stockholder or owner of shares in a corporation."

Hughes Mfg. & L. Co. v. Wilcox, 13 Cal. App. 22; 108 Pac. 871.

It will be remembered that the shares of stock referred to in the complaint and of which shares

plaintiff trustee alleges he has been deprived by a fraudulent sale to Rauer by Buckman in January, 1914, are shares of stock in the new corporation organized December 12, 1911. This corporation is the second corporation and no certificates of stock were issued in this new corporation pursuant to the agreement that certificates of shares in the old corporation should represent a like ownership in the new corporation.

B. The Sunset Construction Company, being Apparently a Corporation Transacting Business was for all purposes a de facto Corporation, and no Inquiry is open as to whether the Corporation had Complied with all the Forms Prescribed by the Statute.

If the Sunset Construction Company was doing business as a corporation, it was not incumbent upon Rauer to examine its articles of incorporation, or to see that its by-laws were properly enacted, or to see that its license tax was paid, or to see that the requisite number of shareholders had voted for its officers, or see that it conformed to the regulations of the statute. In other words, if it were an association of persons holding themselves out as a corporation, a person can transact business with that assemblage as such, and the matter is not open for inquiry as to whether it is a *de jure* corporation.

Today a very great volume of business is done through corporations, and how could it be deemed reasonable that before a person could do business with a corporation, he would be obliged to see that

it had been regularly incorporated, and had followed all the forms prescribed by the statute.

We quote from a few of the cases:

(Clarke on California Corporations)

“If the corporation claims in good faith to be legally incorporated and is doing business, it is sufficient.

“A corporation *de facto* may legally do and perform every act and thing which the same entity could do or perform were it a *de jure* corporation. As to all the world except the paramount authority under which it receives its charter, it occupies the same position as though in all respects valid, and even against the state except in direct proceedings to arrest its usurpation of power, it is submitted its acts are to be treated as efficacious.”

(Pages 64-65.)

And again *supra*, p. 68-69, and cases cited:

“What is a corporation *de facto*? It exists when a number of persons have organized and acted as a corporation; have put on the habiliments of a corporation; have assumed the form and features of a corporation; have conducted their affairs to some extent, at least, by the methods and through the officers usually employed by corporations; have assumed the appearance, at least, of the counterfeit presentment of a legal corporate body. Quo warranto is the proper and only proceeding to test the right to a franchise to exist, or to procure a judgment of its forfeiture.”

Of course, in the instant case, the pleadings allege the incorporation of the Sunset Construction Company No. 2. It is made a party defendant in

the suit, and all the pleadings and the evidence are directed towards the manner in which it functioned. There is no question that it was a de facto corporation, and to our mind there is no question that it was a de jure corporation, but whether a de jure corporation or not, it certainly was a de facto corporation, and being such it is a legal entity, and its existence must be recognized.

C. The Decree Legally could not go beyond the Issues raised by the Pleadings, and the only Issue raised by the Pleadings, or Alluded to in the Evidence was the question of the Ownership of the Shares of Stock.

It is elementary that a judgment cannot go beyond the issues raised by the pleadings. We have pointed out that neither by the pleadings, nor the evidence, was there any suggestion of any matter being before the court, except as to whether the shares of stock at one time owned by Buckman, and pledged to Rauer, and sold by him under the pledge to Meadows belonged to the trustee as representative of the Buckman estate. The only issue tendered was whether a transfer made by Buckman of these shares was in fraud of his creditors, and the *only relief sought* was to have it declared by the court that the transfer was in fraud of creditors, and have it adjudged that these shares of stock belonged to the trustee, as representing the insolvent estate (Transcript pp. 6-7), and there was no evidence upon any other point.

Great stress is laid by counsel for plaintiff on the fact that the shares of stock in the old corporation,

Sunset Construction Company No. 1, were used and viewed as shares of stock in the Sunset Construction Company No. 2, and it is contended that there was no issuance of shares of stock in Sunset Construction Company No. 2, and it is argued that if no pieces of paper were issued, evidencing holding of stock in Sunset Construction Company No. 2, there could be no owner of shares of stock in Sunset Construction Company No. 2. It will be borne in mind that Rauer did not know of the existence of the two corporations, and that the existence of these two corporations was discovered by the parties to this suit, or by the attorney for the plaintiff, only at the time of the trial of the case. It will be borne in mind also that the ownership of shares of stock in the corporation does not depend upon the issuing of a piece of paper evidencing that ownership. The further fact also must not be forgotten, that the property acquired by the Sunset Construction Company No. 2 was by virtue of a transfer from Sunset Construction Company No. 1, and the only consideration for the transfer was that the holders of the shares of stock in the Sunset Construction Company No. 1 should be the stockholders in the Sunset Construction Company No. 2 in the same proportion as they were in the Sunset Construction Company No. 1. No other consideration moved in the matter of the transfer. Logically it might be urged that if the issuance of pieces of paper marked shares of stock in Sunset No. 2 were an essential before one could own shares

of stock in No. 2 then no property of any kind belonged to Sunset No. 2 because the only consideration passing to Sunset No. 1 for the transfer to Sunset No. 2 of all the property it possessed was shares of stock in Sunset No. 2, and hence there would be no consideration. And the further fact must also be borne in mind that Sunset Construction Company No. 2 had no assets of any kind except the property transferred to it by Sunset Construction Company No. 1. The corporation referred to in the complaint is a corporation incorporated on the 12th day of December, 1911, (see paragraph III, page 3 of transcript), and which corporation is corporation No. 2. But we repeat, the evidence showed that Rauer had no knowledge that there were two corporations or that the certificate of shares which was pledged to him was of the shares of stock in Sunset Construction Company No. 1, and it will not be forgotten that it was not until the trial of this case that it was discovered by Rauer and by the plaintiff that there had been two corporations.

Rauer, for valuable consideration, advanced money, the payment of which was secured by a pledge by Buckman of the shares of the Sunset Construction Company, which Buckman represented to be a valid issue, and Rauer, having acted in good faith and on the strength of these representations, Buckman would be estopped from making any statement that his representations were not

true, and likewise his assignee, the plaintiff in this suit, would be estopped.

It seems clear to us that the foregoing proposition is correct. But we would not have to rest this proposition on the ground of estoppel. If Buckman were entitled to the shares of stock, whether they were issued or not, would not affect his right. The issuance of the certificate would be simply evidence of that right, but the right could be established otherwise. There is no question it was designed that the shares of stock in the old corporation should be considered the shares of stock in the new, and this would suffice; especially as the only claim that the Sunset Construction Company No. 2 could have to any of the property possessed by it was the fact that it was transferred to it upon consideration that the shareholders in the old corporation should be shareholders to the same extent in the new; and when it is borne in mind that Rauer did not know there were two corporations and did not know that the shares of stock so pledged to him had not been issued in the new corporation, this right of Rauer should not be questioned.

Having now reviewed the pleadings, the evidence and the propositions of law applicable to the facts and the pleadings, we come to the consideration of the decree itself. Paragraph 1 of the decree refers to the shares of stock of the Sunset Construction Company; paragraph 2 recites that Buckman "was the owner of the Sunset Construction Company, a

corporation, and of all the property, books and records of said company, and that on said last mentioned day said company, property, books and records vested in and became, and now are the property of R. Cords, Jr., as trustee of the estate of A. E. Buckman, bankrupt." It is contended that the language of this second paragraph is equivalent to a decision that the Sunset Construction Company never existed as a corporation. It must be conceded that the language of this second paragraph is not legally precise. One cannot be the owner of a corporation. We think the language should be construed as meaning that since Buckman was the owner of all the shares of stock in the corporation, that in equity he would be considered the owner of the property of the corporation, and if Buckman were such owner, then his trustee in bankruptcy would succeed, and might in a broad sense be called the owner of the corporation. The language cannot be taken literally, and a construction should be given in harmony with the first paragraph of the decision. If this second paragraph be construed as determining that there was no corporation and that the litigation does not concern the shares of stock, then the judgment is outside of the issues. Further, there being no evidence whatever before the Court to justify a judgment that Rauer was a party to any fraud with Buckman in the formation of the corporation to be used as a mask to defraud Buckman's creditors, the decree should not be construed

as making such a determination, if another construction can be given which is consistent with the evidence and justified by the pleadings. Why insist upon a construction which is entirely unsustained by the evidence or warranted by the pleading?

D. The Interlocutory Order or Decree is not Sustained by the Evidence, if Plaintiff's Construction Thereof be Correct.

We have heretofore discussed the pleadings and the evidence and the terms of the decree and interlocutory decree for the purpose of showing that the decree should be construed as a determination relative the ownership of the shares of stock in the corporation. That the decree should not under the issues raised by the pleadings and the evidence before the court and the terms of the decree itself be construed as an adjudication that Rauer was a party to a fraudulent scheme concocted by Buckman, whereby Buckman, under the cover of a corporate name transacted business from the time of the formation of the corporation for the purpose of defrauding his, Buckman's creditors.

During the discussion we have referred to the evidence upon which the interlocutory decree was based with the thought that thereby a proper construction of the decree would be aided. We have contended there was no issue before the Court except only as to the ownership of the shares, and that the evidence indicated that to that question the attention of the Court was directed. We now submit that under the evidence presented to the

Court, and upon which the interlocutory decree is based, there is no evidence whatever warranting any decree that the shares of stock were fraudulently transferred by Buckman to Rauer or that Rauer was a party to any fraudulent conspiracy with Buckman whereby Buckman was enabled under the cloak of the corporation, the Sunset Construction Company, to defraud his creditors. There is not to our mind a scintilla of evidence to support either conclusion. Fraud is never presumed. It must be proved. The plaintiff is simply a trustee of Buckman, and has no greater rights.

The testimony upon which the interlocutory decree is based is very short and the remarks of the trial judge very illuminating. We earnestly ask the court to read the same. (Trans. pp. 209 to 238.)

It will be remembered that the trustee in bankruptcy was selected by those persons who were creditors of Buckman personally. That no creditor of the Sunset Construction Company participated in the selection of the trustee or filed a claim against the estate. That the trustee in bankruptcy sent out no notice of any kind to any creditors of the Sunset Construction Company but only to those creditors who were creditors of Buckman personally. It will be borne in mind that the adjudication in bankruptcy was brought about by voluntary petition by Buckman following a judgment of \$15,000.00 obtained against Buckman by an irate female for breach of promise of marriage; that in no wise did

the trustee in bankruptcy so much as suggest to any person dealing with the Sunset Construction Company they were doing so at their peril, and not until the filing of this complaint was the thought ever brought forward that those who were transacting business with the Sunset Construction Company were in law transacting business with Buckman, a bankrupt.

The Master in his report finds that

“Rauer will suffer loss by reason of the fact that he believed himself entitled to deal with the Company after Buckham’s bankruptcy as a separate entity, not affected by his bankruptcy. These, however, are matters that concern the correctness of the interlocutory decree only, and so far as Rauer is concerned, I shall hereafter embody a recommendation that he be allowed to prove his claim herein.” (Transcript, page 63.)

It does not require the report of the Master to establish that Rauer believed he could legally transact business with the corporation. The judgment against Rauer proceeds upon the idea that for the money he advanced to the corporation in good faith before the filing by Buckham of his petition in insolvency, and which had not been previously repaid, Rauer would get a percentage of the debt upon presenting his claim to the trustee in bankruptcy, and would get nothing for what he had advanced afterwards. And it will be borne in mind that Rauer had no knowledge of any kind that Buckman had filed a petition in bankruptcy, or had been adjudicated a

bankrupt, much less had he the knowledge that the adjudication in bankruptcy of Buckman was in law an adjudication in bankruptcy of the corporation, the Sunset Construction Company, with whom he had been transacting business amounting to thousands of dollars for many years before as well as after such adjudication.

Sunset Construction Company No. 2 was organized December 12, 1911; Buckman's bankruptcy was February 19, 1915, three years and two months later. But the theory now contended for by plaintiff is that Mr. Rauer and Buckman had organized Sunset Construction Company No. 2 in December, 1911, apprehending that in 1915, Buckman, one of the stockholders, might have a judgment for breach of promise of marriage rendered against him and be thereby forced into insolvency. And Mr. Rauer had advanced to Sunset Construction Company between those dates, even as the Master found, over \$18,000.00, more than had been repaid to him.

Mr. Rauer had nothing whatever to do with the organization of the Sunset Construction Company or its internal affairs. See Filmore Buckman's testimony, transcript pp. 299-300, and Rauer's, pp. 301-3, and A. E. Buckman's testimony, pp. 305-6.

It will be borne in mind that the trustee in bankruptcy stood by and permitted Rauer to advance these subsequent moneys in the full belief by Rauer that the transaction was with the Sunset Construction Company. It will be remembered that for every

dollar Rauer so advanced the trustee is enriched to the extent of probably 99c as 1% on the dollar is probably the amount of the dividend that the creditors of Buckman would receive, and it will further be borne in mind that the only source from which any dividend would be paid to the creditors of Buckman personally are the assets of the Sunset Construction Company, created, enhanced and preserved by the money in good faith advanced by Rauer to the corporation both before and after the adjudication of Buckman's bankruptcy. And the trustee stood by and permitted Rauer to continue to pour his money into the corporation.

In view of these facts equity should certainly create an estoppel.

If the Sunset Construction Companys were not de juri corporations, but were only de facto ones, it must follow (as directed in the decree) that defendant Rauer's accounts with such de facto corporation must be first determined; and only if, after all the accounts between him and it are fully settled, and upon the final balance cast he owes the corporation anything, that for this, and this alone, would he be required to account to the trustee, as the owner of the stock. And if these corporations were not de juri corporations as plaintiff expressly alleges them to be, yet they would still be de facto corporations as far as defendant Rauer is concerned in the light of the Master's express finding that "defendant Rauer will suffer loss by reason of the

fact that he believed himself entitled to deal with the Sunset Construction Company after Buckman's bankruptcy as a separate entity not affected by his bankruptcy," and by every other fact shown by the evidence in this case.

All of the matters above set forth in relation to the basis for and meaning of the interlocutory decree are contained in the record (Transcript, pp. 209-238) and because these pages are so few and the matters so intertwined we have not made more specific references to the record.

OBJECTIONS TO THE FINAL JUDGMENT DISALLOWING APPELLANT'S OBJECTIONS TO THE REPORT OF THE MASTER AND THE ENTRY OF JUDGMENT PURSUANT TO THE REPORT.

The objections under this head are two-fold.

First: There is a general objection indicated by Exception No. VIII made by Rauer to the final judgment herein (see Transcript, page 400.) This exception is as follows:

"The Master's said report, and the whole thereof, should be set aside and considered null and void, and the failure so to do is hereby assigned as error, and for the following reasons:

That it appears from the record in this case that the action is prosecuted by a trustee in bankruptcy, who is not personally liable for the payment of any obligations beyond the extent of assets coming into his hands; that there are no assets of any kind belonging to the bankrupt estate, other than such as might result from

the judgment in this case. That this fact was known and recognized by the Master in his petition to be allowed the sum of \$5,000.00 as compensation for his services in making the report. That in view of the fact that it appears by the record and by the statement of the Master himself in his petition for compensation herein, that only in the event of a judgment against the defendant Rauer, would he receive any compensation for his services, the record shows that he was financially affected by the character of the report he would file and by the judgment to be entered thereon, and therefore his report is void as being made by a judicial officer on a subject matter in which he had a financial interest, and the judgment and report filed herein being in favor of that interest."

The matters embraced in the foregoing exception are also embraced in the matter of the appeal from the judgment allowing the Master compensation, and at this time attention is simply called thereto. The matter will be more fully treated under the heading dealing with the appeal from the order allowing the Master compensation and directing the same be paid by Rauer.

The other objections to the final judgment in the matter of disallowing the objections to the Master's report and ordering judgment in pursuance therewith, relate to items in the account, and we will first take up the matters embraced in Exception XIV as stated on page 405 of the record. This exception is directed to the matter of the Master's report in reference to the findings charging Rauer

with the sum of \$9,006.99, as the rental value of the machinery and plant mortgaged to him.

The machinery and property were mortgaged to Rauer in June, 1914, for the sum of \$15,000 and future advances. This mortgage was in every respect bona fide and was so recognized by the Master in his report. By the terms of this mortgage, the mortgagee is entitled to possession upon default as to any portion of the sum secured thereby, and there being default, Rauer had taken possession of the property and used it in the performance of certain contracts. (Transcript pp. 364 and 44.) Quoting from the latter page, Master's report:

"The chattel mortgage is in evidence, and covers certain named equipment and other property of the Company. It was accompanied by the necessary affidavits and was recorded. It contained a clause allowing the mortgagee to take possession after default. The notes were payable on demand, and since there was a continuing balance of indebtedness it is probable that a default occurred at an early date."

The property was of the value of \$3,701.60 and the Master charges Rauer with the sum of \$9,006.99 for the use of this property for a period of fifteen months. While we think the charge of \$9,006.99 rental value is out of all reason, yet our main complaint is that Rauer is not allowed a credit for this alleged rental as against the mortgage indebtedness. The Master and the decree charge Rauer with this sum of money, and say he must pay this amount, dollar for dollar, and refuse to allow the same to be

taken into account in connection with the mortgage under which the property was in the possession of Rauer. Of course the mortgagee in the accounting should give credit to the mortgagor for the value of this use as against the mortgage indebtedness. The Master and the decree say he cannot, and that Rauer must pay the value of this use and cannot get credit therefor on his mortgage lien on this property. It is submitted that in this respect the Master and the decree are in error.

The machinery is of no value unless it is put to use. Unless it is put to use, it is a bill of expense. The bill of expense would not be so great as would be a bill of expense on a mortgage on live stock.

Let us assume that Rauer, instead of having a mortgage upon the machinery, had a mortgage on a number of mules, and under the terms of the mortgage was entitled to the possession. Could it be contended that it would not be the duty of Rauer to see that these mules were put to work if the opportunity offered so that thereby they would not eat their heads off, and that the mortgagor would acquire some return for the capital he had invested in his mortgaged property? What advantage would it be to the mortgagee to have possession of the property, if he could not have the use thereof, the use being the customary use to which the mortgagor would himself put the property. The use of the property would be an advantage to the mortgagor. The mortgagor thereby has an opportunity

to have his indebtedness decreased, to obtain interest upon his investment in the mortgaged property, and to save a large bill of expense running up for the storage on property which should be put to use. And it is submitted there is no difference in principle between the use of this machinery and appliances than there would be in the case of the above instance of a mortgage on live stock. Of necessity, there is wear and tear on the machinery by its use, and it cannot well be conceived that the mortgagee would permit the use of the machinery, thereby impairing his security, unless the value of the use would be credited on the mortgage indebtedness.

Further, the evidence shows that the trustee with full knowledge that the machinery was being used by Rauer made no objection thereto and in no wise indicated that the use was contrary to his desire, and Rauer made use of the machinery believing in good faith he had the right so to do and to have the value of the use applied in reduction of the mortgage.

If a trustee or pledgee has funds in his hands, it would be his duty to see that the money or property belonging to his pledgor brought in a return, and if a trustee in possession fails to utilize the trust property so as to earn something for the trustor, he would be charged with neglect.

We submit that Rauer was entitled to use this property under the terms of the mortgage, and being

so entitled, that the rental value goes to him as a part of his security. That he is obliged to account for his rental value only by giving credit therefor to the mortgagor upon the mortgage indebtedness.

The Master's report and decree confirming it not only refuse him the right to do this, but refuse him even the right to credit against these rentals, \$2025.96 spent by Rauer in rebuilding and repairing this very property so that profit could be derived therefrom with the exception that the Master does allow him \$148.43 for these repairs for the fifteen months use at the roughest kind of work, and for which the Master has charged him with rentals to the amount of \$9006.99, and has even charged him with the scrap iron made up of the parts of the machinery which Rauer replaced. (Exceptions V, VI and VII, pp. 163-190 of transcript, embodied in objections to Master's Report and Petition, which plaintiff insisted should be a part of the transcript.)

There is no dispute of the fact that defendant Rauer took possession of the mortgaged property, and employed it and rented it out. Counsel in the lower court devoted pages to show this, and we equally affirm it as a fact. And counsel quoted with great approval the following from 11 C. J. 561.

“While the right of redemption exists, a mortgagee in possession is liable to account for the income, profits and proceeds of the mortgaged chattel and, if the nature of the property permits, he is bound to exercise reasonable diligence in keeping it employed.”

Just exactly what we claim, and just exactly what defendant Rauer did. He kept the property employed as much as possible. He collected rentals therefor and for every cent thereof he accounted by applying those receipts upon the indebtedness secured by this chattel mortgage; and none of counsels' citations, and none that he would possibly have found, require the mortgage to account in any other way. \$9,006.99 of the \$13,023.19 charged against defendant Rauer, is charged as such rentals. This is, however, some \$2000.00 in excess of the gross profits or rentals collected by Mr. Rauer; and the net rentals collected are actually only \$1838.56. (See Exception V, pp. 162-173, transcript.)

In order to keep the property employed, Mr. Rauer expended during this period of 15 months, for rebuilding, repairs and betterments, some \$2800.00 and paid royalties on sand machine patents of \$2,200.00, patents covering part of the said mortgaged machinery and necessarily used in connection therewith. (See said Exception V.) The master at first would not allow a cent of this on the ground that Mr. Rauer (the mortgagee) had no right to use or rent the property. And when on a subsequent hearing he became convinced of the erroneousness of this position, he would only allow \$148.43 of these repairs because, as he said, Rauer had only actual written receipts for \$148.43; although Rauer had produced his accounts thereof (which the Master would not consider upon the aforementioned

theory), and Rauer had substantiated those accounts by his testimony (transcript pp. 368-376), and a large portion thereof, also by the testimony of Filmore Buckman. And this decision was made in the face of the fact that Mr. Rauer was charged with making collections of \$9006.99 rentals during 15 months, from equipment worth \$3701.60, used in the roughest kind of work, that everybody knows requires constant and expensive repairs and rebuilding.

And, as the Master found, on February 19, 1915, the date of Buckman's bankruptcy, the Company owed Mr. Rauer \$18,746.22; and this was secured by the pledge of the stock and the chattel mortgage on all the equipment; and the Master charges that Mr. Rauer subsequently collected \$13,023.19, \$9006.99 of which was for rentals and use of the mortgaged property which had been taken possession of by Mr. Rauer. And this the Master charges Mr. Rauer had no right to apply upon the \$18,746.22 secured by the mortgage upon this very property; nor that he had a right to credit against this the sum of \$2800 for repairs and betterments which enabled him to so employ this property, nor some \$2200 royalties for the use of the sand machine patents in connection with the use of said mortgaged property; and besides being charged with all profits and rentals he was charged with \$1164.07 rentals on a job where he had made a loss of \$945. (See Exception V, pp. 167-8 transcript, and Rauer's

testimony, p. 364.) And yet counsel claims that it was Mr. Rauer's duty to employ this mortgaged property so in his possession.

Then in the name of logic and common sense, was it not his duty to keep the equipment in the state of repair that would permit it to be employed? And is it then not his right to be allowed for all of these repairs and royalties he had to pay for that purpose? Our sense of right and justice and logic revolts at an allowance restricted to \$148.43, whatever may be the pretext for such restriction.

To revert to the law upon this point, quoting from 11 C. J. 561 as follows:

"While the right of redemption exists, a mortgagee in possession is liable to account for the income, profits and proceeds of the mortgaged chattels, and, if the nature of the property permits, he is bound to exercise reasonable diligence in keeping it employed."

"But it has been held that he is chargeable for the usual hire only, and not for what was really made out of the use of the property."

We have shown in our Exceptions (trans. pp. 162-66), that the net rental upon this basis for which Mr. Rauer should have to account is only \$883.66, instead of \$9,006.99, charged against him by the Master.

Quoting further from 11 C. J., this time from page 562:

"A mortgagee in possession of mortgaged property is entitled to be credited with all

reasonable and actual expenses in caring for it, if he does not assume to hold in his own right and for his own uses, but as bailee or trustee for the mortgagor.”

That Mr. Rauer held as bailee and trustee for the mortgagor is absolutely established by the fact that he credited the Sunset Construction Company upon its mortgage debt with every cent by him collected as rentals and for the use of this property. This citation further establishes that Mr. Rauer is entitled to be allowed for expenses for betterments and repairs amounting to over \$2200.00, and for which the Master allowed him only the paltry sum of \$148.43.

Quoting again from 11 C. J., this time from page 678:

“A mortgagee in possession must devote rents and profits derived from the mortgaged property to the discharge of the mortgage debt, unless the mortgagor assents to a different appropriation.”

And this is exactly what Mr. Rauer did, and this is what the Master's report confirmed by the decree states he had no right to do, and requires Rauer to account to the trustee for \$9006.99 of rentals which he has already credited upon the indebtedness secured him by the chattel mortgage.

Exception XIII deals with the subject matter of the \$4,016.20, which plaintiff insists is erroneously charged Mr. Rauer.

The error of charging Mr. Rauer with the \$4,016.20 of the \$13,023.19 (aside from the fact that this is purely and entirely an accounting between Mr. Rauer and the corporation which shows the corporation largely in debt to him) is fully set forth in Exception IV, transcript pp. 147-162. In this connection we wish to note the following clerical errors in the transcript:

The last column of table on pp. 157-8 and on p. 338 transcript, should be entitled: "Excess over *paving* bills collected by Rauer"; and the figure at bottom of first column should be 8,763.53 instead of 7,863.53.

These tables and accompanying testimony and explanation and said exceptions show that Sunset Construction Company had grading bills and Rauer had paving against the same parties, and Sunset Company and Rauer were both collecting from them, sometimes Sunset collecting both for the grading and Rauer's paving, and sometimes Rauer collecting his paving and Sunset's grading, and that in the final windup of those joint collections Rauer received \$40.00 less than his total paving bills; whereas the Master charged Rauer with the following as collections of Sunset's grading bills and made no allowance for paving bills collected by Sunset (transcript pp. 76 and 148.)

City warrant	495
Check of Hyman.....	750
“ “ “	250
“ “ Dufaw.....	20
“ “ Ryder.....	245
“ “ H. Meyer.....	649—2,409.

But aside from the above, Hyman testified the checks for 750 and 250 had no reference to the grading work. (Transcript p. 324, also pp. 310-11), and the Ryder check for \$245 is explained by the entry in the Sunset Construction book (transcript pp. 328-329 and 159), as follows:

“The Sunset Construction Company’s books further show the following entries:

“Feb. 24, 1915, Received from Bauer check	\$245.
Discount <i>on note</i>	5.
	<hr/>
	\$250.

“Assigned to J. J. Rauer note Ryder
on 14th Avenue.....\$250.”

This shows that instead of collecting Ryder’s note directly from him the Sunset Construction Company went to Rauer, collected it from Rauer, allowing him a discount of \$5.00, and then assigned the note to Rauer. The Sunset got Rauer’s \$245. in cash in exchange for the \$250 note then and there, and now Rauer is directly to turn over the \$250 to the trustee besides having already paid the Sunset \$245.

The miscellaneous collections charged by the Master against Rauer (transcript p. 76) amounting to \$1607.20, are made up of the following (Transcript p. 148):

Academy of Science	\$300.	
Reeder and Ryder	407.20	
Bosworth	400.	
Iverson	500.	\$1,607.20

These are fully analyzed on pp. 160, 161, 162 of transcript, and, as to two of the items, are shown to be moneys received by Rauer for work done after the Buckman bankruptcy, and as to the other two based on claims undoubtedly assigned before. See also transcript, pp. 309, 337, 338, 339, 160, 161, as to the Academy of Science \$300; and as to the Reeder and Ryder \$407.20, see pp. 161, 162, and Master's Report p. 75, stating this was "in full for *June team hire*" (folio 63). (The statement on p. 335 "in full for *Jan. team hire*" is a clerical error and should be *June*. This in *June, 1915*, four months after the bankruptcy.

Rauer was advancing moneys on contracts, and generally, to the Sunset Construction Co. right along and taking assignments. "Assignments were made to J. J. Rauer of all contracts of the Sunset Construction Company whenever he would lend any money on them, or advance any money for the bank." (Testimony of Filmore Buckman, transcript pp. 299 and 336-7); the last two collections fall under this category.

SECOND: THE APPEAL FROM THE ORDER OR DECREE ALLOWING TO H. M. WRIGHT, AS MASTER, A CERTAIN SUM OF MONEY FOR COMPENSATION AND DIRECTING THE SAME BE PAID BY APPELLANT, J. J. RAUER.

By the interlocutory decree the matter of the accounting was referred to H. M. Wright, Master in Chancery. (Transcript, pp. 15 and 16.)

Pursuant to the above decree an accounting was had before the Master and a report thereof was filed by him, and at the time of making his report the Master petitioned that his compensation be fixed by the Court. (Transcript, pp. 126-127.)

In this petition so signed and presented by the Master it is said:

“Under all the circumstances, the Master believes and represents that a just compensation for his services would be the sum of five thousand (5,000) dollars and that said sum would be reasonable; that a minimum compensation would be forty-two hundred (4200) dollars. With respect to the party against whom it is charged, it is apparent that the usual practice of this court should be followed and that it should be charged against the accounting party, namely the defendant, J. J. Rauer. The justice of following the usual practice is apparent when it is considered that the Trustee in Bankruptcy is understood to have no funds in possession and the amount found due to him from the defendant Rauer ought not to be depleted to the loss of the creditors in bankruptcy.

Wherefore, petitioner prays that this Court make its order fixing Master's compensation in the sum of five thousand (5000) dollars; that the amount to be paid by defendant J. J. Rauer, within ten (10) days from date of the order.”

It is thus apparent that the Master was cognizant there would be no funds out of which his compensation of \$5000 could be paid unless a judgment was entered against defendant Rauer. It could not be that the Master believed the plaintiff would pay the \$5000 as the petition shows the Master knew the plaintiff was suing representatively as Trustee in Bankruptcy, and no funds belonged to the estate excepting such as might be recovered through a judgment in favor of the trustee and against Rauer in the matter of the accounting.

Defendant Rauer excepted to his report on the ground that the Master was disqualified, and also on the ground that the \$5000 claimed as compensation was excessive. (Transcript, Exception VII to Report of Master, pp. 176-7.)

The District Court afterwards fixed this at \$1800. Defendant Rauer assigned as error the disqualification of the Master, not only on the appeal from the order fixing the Master's compensation (Exceptions II and IV, Transcript, pp. 380-381), but also on the appeal from the judgment confirming the Master's Report and awarding judgment against defendant Rauer. (Transcript, Exception VIII, pp. 400-401.)

It is not the intent of counsel for Rauer to charge the Master with conscious bias or to say he was affected by the foregoing considerations.

It is a fact, however, that the Master had knowledge at the time he made his report that unless a judgment was entered against the defendant Rauer as recommended by the Master's report there would be no money available to pay the \$5000 which the Master petitioned be allowed him for his service in making the report. This report was adopted by the Court and a judgment entered in accordance therewith.

It is true the Court denied the Master's petition that he be allowed \$5000 for his service in making the report and reduced the amount of the allowance to \$1800. This reduction by the Court of the sum asked for by the Master from \$5000 to \$1800 does not, however, meet the objection that when the Master submitted his report he petitioned for and anticipated receiving \$5000, which only could be paid him if a judgment went against Rauer as recommended in the Master's report.

It is respectfully submitted that the judgment and orders appealed from should be reversed and judgment should be ordered in favor of appellant.

Dated, San Francisco,

October 22, 1923.

H. M. ANTHONY,

J. B. ZINDARS,

WILLIAM GRANT,

Attorneys for Appellant.

No. 4091

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. J. RAUER,

vs.

Appellant,

GEORGE H. HATFIELD, as trustee in bankruptcy of the estate of A. E. BUCKMAN, bankrupt, and H. M. WRIGHT, et al.,

and

Appellees,

J. J. RAUER,

vs.

Appellant,

GEORGE H. HATFIELD, et al.,

Appellees.

BRIEF FOR APPELLEE, GEORGE H. HATFIELD,
AS TRUSTEE IN BANKRUPTCY OF THE
ESTATE OF A. E. BUCKMAN, BANKRUPT.

EDWIN H. WILLIAMS,

CHARLES S. WHEELER, JR.,

Attorneys for Appellee,

*George H. Hatfield, as Trustee in
Bankruptcy of the Estate of
A. E. Buckman, Bankrupt.*



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**BRIEF FOR APPELLEE, GEORGE H. HATFIELD,
AS TRUSTEE IN BANKRUPTCY OF THE
ESTATE OF A. E. BUCKMAN, BANKRUPT.**

Introduction.

In this brief we shall not discuss the question raised by appellant as to the propriety of the compensation awarded the Master. We shall also ig-

nore, as unworthy even of comment, the ridiculous claim that the Master was disqualified. We shall confine our attention to the first appeal mentioned in appellant's brief (see Aplt. Op. Br. p. 10), viz: the appeal taken from the so-called "interlocutory" decree and also from the final decree rendered in the Court below. As to the final decree, said appeal involves questions as to the Master's rulings upon an accounting had between Rauer, the appellant, and the above named plaintiff and appellee. With reference to the so-called "interlocutory" decree, the appellant attempts to raise certain questions as to the right of the plaintiff and appellee to take possession of the assets of Sunset Construction Company, a purported corporation.

As we shall point out later in this brief, the so-called "interlocutory" decree is in truth a final decree as to all matters covered thereby (except the settlement of accounts), and, since said decree was rendered many years before this appeal was taken, the appeal therefrom should be dismissed or at least all questions raised in connection therewith should be ignored, upon the ground that the time to appeal therefrom has long since expired.

We feel that it is necessary for us to make a full statement of the facts in this brief, as the statement made by appellant well merits the same comment earned by a former statement made by appellant before the Master in Chancery when the latter said (Tr. p. 75):

“This is a very mistaken and reckless statement of facts.”

Statement of Facts.

The plaintiff and appellee, Buckman's trustee in bankruptcy, filed a bill in equity for two purposes: First, he sought to secure a decree holding that all of the assets of Sunset Construction Company were in reality the property of A. E. Buckman (Tr. p. 3), and, second, he sought to have the transfer of the capital stock of Sunset Construction Company from Buckman, through Rauer, to one Meadows, set aside on the ground of fraud.

During the trial it was brought out that there was not *one* Sunset Construction Company, but *two*. The first corporation of that name was organized by A. E. Buckman with the assistance of several dummies. Its charter was forfeited in December, 1911, for non-payment of its franchise tax. Early in the existence of this corporation certain of its stock were issued. Three shares were issued merely to qualify directors. These shares were actually owned by A. E. Buckman. The only other stock issued (10,150 shares), was issued to A. E. Buckman and pledged by him to Rauer. This is the stock referred to in the pleadings and in the evidence. No stock was ever issued in Sunset Construction Company No. 2.

The two Sunset Construction Companies, both mere naked forms, were dominated and owned absolutely by A. E. Buckman. After the charter of the first Sunset Construction Company had been forfeited, the second corporation of the same name was organized,—Buckman naming the same directors. (Tr. pp. 224-225.) It was planned to issue stock in the new corporation to substitute for the stock of the defunct corporation, but this was never done. Stock was filled out in part, but the new certificates were never signed by the secretary and were never issued. They were left intact in the stock certificate book. (Tr. pp. 224-225.)

Counsel make the astounding claim (see Aplt. Op. Br. p. 30) that the only evidence introduced in this record by the parties

“is directed simply and solely to the question of the ownership of the shares of stock pledged by Buckman to Rauer, and by Rauer sold under the pledge to Meadows,—the Trustee claiming these shares should pass to the estate, and the defendants insisting that the sale was made under a valid pledge.”

The transcript fairly teems with testimony on the subject of Buckman's ownership of all of the assets of Sunset Construction Company No. 2, the only living corporation. For example, attorney W. H. Chapman, who organized Sunset Construction Company No. 2, testified as follows (Tr. p. 227):

“The stock of the corporation was not issued to Mr. Buckman but he was the incorporator

of the corporation *and the owner of the assets*. I don't think we had any stockholders' meeting except the original meeting of the stockholders to adopt the by-laws. That is the only stockholders' meeting they ever had." (Italics ours.)

A. E. Buckman, the bankrupt, also testified (Tr. p. 230):

"I was the incorporator of the company and owned the stock. All of it. Although it stood in the name of people as trustees, I owned the stock, was supposed to own it."

Filmore Buckman testified that A. E. Buckman was president and general manager of the corporation and that he drew as much money from it as he desired. Often he would not even take the trouble to account to his bookkeeper at all for moneys spent. He used them for expenses, *which included personal living expenses*. (Tr. pp. 210-211.)

Filmore Buckman says:

"There was no fixed amount that Mr. Buckman was allowed for expenses. Sometimes it ran into the neighborhood of \$500 a month in carrying on the business. * * * Mr. Buckman took whatever money he needed from time to time. He was naturally managing the business. * * * By personal expenses I mean expenses for his own personal use,—that is, living expenses."

Clearly "Sunset Construction Company No. 2" was a mere alias for Buckman, a bankrupt, and

Sunset Construction Company No. 1, which served a like function, was altogether out of existence. Sunset Construction Company No. 2 issued no stock, it held no formal meetings and its purported directors were the confessed dummies of A. E. Buckman. It was a mere cloak to shield Buckman's activities,—activities in which Rauer was a very energetic participant.

The purpose of their connivance is brought out significantly by a Mrs. Louise Brown, one of Buckman's creditors, whose testimony stands in the record without contradiction. (Tr. p. 234.)

"Mr. Buckman stated to me in reference to my claim that before he would pay my claim he would see me in Hell first,—before I would get one dollar of his money. He also said he would go through bankruptcy, and would even go to State's prison before he would pay me * * *. Mr. Buckman hears me and knows that I speak the truth."

Rauer's connivance with Buckman commenced sometime in March of 1911. At that time he started lending money to "Sunset Construction Company No. 1",—in reality to Buckman. When that company became defunct, he had advanced to it (i. e. to Buckman) some \$19,000. (Tr. pp. 241-245-247-248.) All of this indebtedness was eventually paid up by securities placed in his hands by Buckman.

In January 1914, Rauer held a note for \$15,000, which had been given him by W. H. Chapman to

represent the balance of indebtedness due him, Rauer, from Company No. 1 and which had not been fully liquidated through the sale by Rauer of the securities held by him. There had been received by Rauer a credit of \$6734.16 which he applied upon this indebtedness prior to January 1914 (Tr. pp. 241-247), but neither this nor any other credit was ever endorsed upon Chapman's note. In January 1914, Rauer took the note of Buckman for \$20,000 which covered the same indebtedness as the Chapman note already executed, as well as certain additional sums claimed to be due from Company No. 2. (Tr. p. 278.) By executing this latter note Buckman acknowledged his liability as an original debtor both for the balance due Rauer from Sunset Construction Company No. 1 and for the amount then due from Sunset Construction Company No. 2, Rauer accepting said note as additional security upon the indebtedness of the Sunset Construction Company. He so alleges expressly in his answer and so testified under oath. (Tr. p. 273.)

Before the Master, Rauer testified as follows (Tr. p. 278):

"Q. Why was it, you took that note executed by A. E. Buckman instead of having it executed by the Sunset Construction Company?

A. There was really no reason for it. *He was really the whole shooting match.*"

(And yet counsel find it possible to state again and again in their brief that Rauer, in his inno-

cence, never knew that Buckman and his company were one and the same!)

Thereafter, Rauer in the name of an admitted dummy, one Wehrle, took a chattel mortgage from Sunset Construction Company No. 2 to secure two notes, one for \$5000 and the other for \$10,000. (Tr. pp. 272-3, 278-9.) These notes Rauer says secured the same indebtedness as the others from Chapman and Buckman which he already held. (Tr. p. 273.) But Rauer was insatiable. As "additional security" he had Buckman write him out checks in the name of Sunset Construction Company which he held without cashing (Tr. p. 282), as all of the parties involved knew there were no funds in the bank to meet them.

So, at one ~~and~~ the same time (i. e. the time of bankruptcy), Rauer held:

Note of Chapman for	\$15,000.	
Note of Buckman for	\$20,000.	
Notes of Sunset Construction Co. aggregating,	\$15,000.	
Checks of Sunset Construction Co. aggregating	\$20,584.95	\$70,584.95

Rauer's account filed with the Master claimed on the date of Buckman's bankruptcy that there was due him a total of \$33,084.95. (Tr. p. 256.) Even this was many thousands of dollars in excess of what the Master found that Rauer was justly entitled to receive on that date. Yet Rauer held all of these instruments, without the endorsement of a

single credit upon any one of them,—save only the credit for \$7500 endorsed on the notes of the Sunset Construction Company which was later cancelled by Rauer.

From the foregoing it is clear that Rauer was well aware that Buckman and Sunset Construction Company were identical and that he was conspiring with Buckman to cover up Buckman assets by receiving duplicate evidences of the same indebtedness and taking liens on every shred of property which Buckman held or possessed. It was only after a rigid and prolonged inquiry that it was disclosed that all of these apparently valid and separate obligations covered one and the same indebtedness.

Rauer finally admitted (Tr. p. 273):

“I held three promissory notes and they represented the same indebtedness, but I held different collateral. I collected interest at $1\frac{1}{2}\%$ a month for a time up to the execution of the note for \$20,000 and afterwards at the rate of 2% a month.”

(It may be remarked in passing that the extraordinary interest charges indicated in the foregoing testimony afford some answer to counsels' query (see Appl. Br. p. 28) as to how Rauer benefited by his part in the conspiracy.)

In this case, there is ample evidence reflecting generally upon appellant Rauer's trustworthiness. There is positive evidence that Rauer testified to what was not true in a number of instances where

the testimony pertained to facts of crucial importance. The attempt of a party defendant to cover up the truth by giving false testimony upon material issues is always strong evidence of culpability. Here we deem it an important factor in establishing the fraudulent nature of Rauer's dealings with Buckman and the utter unreliability of the testimony of either of these parties.

It has already been shown that Rauer held Buckman's paper witnessing an indebtedness far in excess of the true amount due him. His excuse was that he took the duplicate evidences of indebtedness for the purpose of affording himself "additional security". But what means did Rauer take to establish the true amount due him? None of the notes or checks witnessed on their face that the indebtedness which they evidenced was already represented by other instruments. No such statement is made in any other document introduced in evidence. We were forced to seek the true amount due Rauer from his own testimony on cross-examination, and from a careful analysis of his accounts.

Rauer's sworn answer expressly alleges (Tr. p. 11):

"At various times balances were struck between said J. J. Rauer and said Sunset Construction Company and said balances at various times were as follows: * * *

On December 6th 1913 the sum of \$20,000."

Rauer's account offered in evidence and sworn to by him as a true statement of account shows that the amount due to Rauer on December 3rd, 1913, was \$31,460.50. (Tr. p. 255.) There were no transactions between Buckman and Rauer et al. between this date and December 6th.

Rauer testified as a witness (Tr. 243) that the correct amount due him on December 3rd, 1913 was \$20,000. Later (Tr. p. 272), Rauer testified that on December 12, 1913, the Sunset Construction Company owed him a note for \$20,000 and two unpaid checks, one for \$8260 and the other for \$3000. His account shows no transaction between the dates of December 3, 1913, and December 12, 1913.

Filmore Buckman testified that there was only one check for \$8260 and that check was executed in the spring of the following year,—May 20th, 1914. (Tr. p. 296.) He testified, further, that the ledger sheet of the Sunset Construction Company shows that the corporation owed Rauer \$21,490 on December 26, 1913. (Tr. p. 298.)

In regard to the matter of interest, Rauer denied specifically that he collected any interest whatever from the Sunset Construction Co. during the year 1914, and testified (Tr. p. 273):

“I did not collect \$400 a month interest on the \$20,000 note. I never got a ten cent piece interest on that note.”

Thereafter a series of checks were introduced in evidence which showed very large payments

made to Rauer between May 31, 1913 and April 6, 1915 (Tr. p. 274), and it ~~was~~ stipulated (Tr. p. 295), that these checks included payments of interest to Rauer amounting to the sum of \$6619.

Rauer's account, which was sworn to by him as correct, shows no payments whatever received by him between the dates of November 10, 1913 and July 15, 1915 (Tr. pp. 255-256), but the list of checks last above referred to prove conclusively that he received approximately \$23,000 in coin between the dates mentioned.

Rauer swore in an affidavit filed in the matter of Buckman's bankruptcy that he had loaned the Sunset Construction Co. an aggregate of some \$105,615.84 up to March 15 (Tr. 284), "upon which there has been paid back to affiant up to that said last date, the sum of \$76,741.02, leaving a balance due of \$28,874.82". This allegation is supported by two other sworn statements made by Rauer (Tr. p. 283), and other corroborating evidence. (Master's Report, 25.) Yet his account submitted to the Master showed less than \$61,000 in credits received by Rauer up to the time mentioned. Rauer was asked (Tr. p. 284):

"Is there any explanation which you want to make why the amount that you have credited in the account to Sunset Construction Co. is some \$16,000 less than the amount that you have stated in your affidavit was paid by the Sunset Construction Co. prior to March 15, 1915?"

A. I will have to run over the statement and see."

Rauer was later recalled but gave no explanation.

The Master (Tr. p. 284...):

“The point is that you file an account with no vouchers at all. I presume that if I had examined this carefully I would have thrown this account out in the first place.” * * *

The foregoing are merely a few of the glaring instances of efforts made by Rauer to deceive the Court. His account was confused by incorrect dates, by incorrect names, and also through the simple expedient of omitting material items; and, in more than one case, he resorted to the segregation of a single transaction into numerous items, scattering them broadcast through a very long account. His whole effort at the trial of this action was to confuse the issues and conceal the truth. We firmly believe that the tactics to which he resorted were in large measure successful, and that the judgment against him represents but a mere fraction of what is truly due from him to Buckman's trustee. Judge Van Fleet was evidently cognizant of this fact when, in his oral opinion, he said:

“The Master, I think, if he committed any error, committed it against the parties prevailing as to the extent of the accounting required.”

In closing this statement of the dealings between Rauer and Buckman, and before taking up the so-called “interlocutory” decree and the accounting had pursuant thereto, we should perhaps call the

Court's attention to one further matter. At page 3 of appellant's brief we find the following:

"None of the creditors of Sunset Construction Company filed any claims against the Bankrupt's estate, nor was any notice sent to those who had dealings with Sunset Construction Company and a nominal bond in the sum of \$100 was given by the Trustee elected by the creditors who were limited as before stated to those who had done business with Buckman individually."

Obviously Rauer's purpose in making the foregoing statement in his brief is to create the impression in the mind of this Court that, in holding Sunset Construction Company a mere instrumentality of Buckman, and the assets of that company Buckman's assets,—an injustice has been done to innocent creditors of Sunset Construction Company. Rauer's own testimony affords the best answer to this suggestion. At page 364 of the transcript will be found his unqualified assertion that he, personally, was the only creditor of Sunset Construction Company. (See, also, the same assertion in appellant's brief, page 27.) Furthermore, even were the fact otherwise, the "interlocutory" decree would not work an injustice upon Buckman's creditors who dealt in good faith with "Sunset Construction Company".

Assuming that Sunset had creditors other than Rauer at the date of Buckman's bankruptcy, there is no reason why the bankruptcy Court should not, in the exercise of its equity jurisdiction, permit

such claims to be proved and allowed in the estate in bankruptcy of A. E. Buckman, to be paid in due course of administration.

The Special Master suggests the exercise of this very power with regard to Rauer's claim against Sunset Construction Company and, while we sincerely disagree with the Master as to the propriety of any such proceeding in *Rauer's* case, we nevertheless concede that, in any proper case, this procedure should be followed. At any rate, Rauer is in no position to complain.

As to the fact that Sunset Construction Company No. 2 was never formally declared a bankrupt: In view of the fact that it has been determined that all of the property of Sunset Construction Company No. 2 belonged to the bankrupt and passed to his trustee, there is no reason why said corporation should have been formally declared a bankrupt. Indeed, such procedure would have been wholly unsound, since it would involve a contradiction in terms. A Court of equity, looking through form to substance, has ascertained that the corporate form must be disregarded entirely; that Buckman and his dummy company were one and the same. Therefore, the decision of the Court,—followed to its only possible conclusion.—must mean that all creditors of the so-called Sunset Construction Company (assuming the existence of such creditors), were Buckman's creditors. Hence, Buckman's bankruptcy was the only bankruptcy that could exist in

the premises, in so far as all of these creditors were concerned.

THE SO-CALLED "INTERLOCUTORY" DECREE.

The nature of the inquiry on accounting before the Special Master in Chancery was obviously measured and defined by the express terms of the "interlocutory" decree by which the accounting was ordered. There is no possible ambiguity in this decree.

In view of the pleadings in this case, it is difficult for us to understand how appellant's counsel can claim at this time that the ownership of stock and the accounting as to its value is the only issue covered by the decree. Counsel evidently concede that the decree must be construed in the light of the pleadings and evidence. However, counsel's interpretation of the decree is blasted by this same record.

The suit is in equity and it is alleged in the bill that the corporation

"amounted no nothing more and has amounted to nothing more than the placing in a corporate form of the capital of said Buckman and his abilities as a General Construction Contractor",

and that

"said corporation was formed and organized as a covering for the activities and operations of said A. E. Buckman under the form and legal entity and name of said corporation".

Furthermore, counsel to the contrary notwithstanding, it is also alleged, not only that Rauer conspired with Buckman in the matter of the transfer of shares, but that Buckman and other persons, *including J. J. Rauer*, operated and carried on the corporation and its business for the benefit of each of them, and that they received the profits thereof. We respectfully refer the Court to paragraph VI of the bill for substantiation of this statement.

The second paragraph of the decree decides that A. E. Buckman, at the time of his bankruptcy, was the *owner* of all of the *property*, etc. of Sunset Construction Company and that at said time all of said *property, etc.*, vested in and became the property of Buckman's trustee. The third paragraph orders the defendants, including J. J. Rauer, to account for all moneys and property received by them from Sunset Construction Company *since the 13th day of December, 1911*. This date was the date of the incorporation of Sunset Construction Company No. 2. Since the *first* Sunset Construction Company had forfeited its charter long prior to December 13th, 1911,—not only the date of the incorporation of the second company, but also the express date from which the accounting was ordered to commence,—*this accounting is alone concerned with the activities of A. E. Buckman and Sunset Construction Company No. 2.*

In directly adjudging A. E. Buckman, bankrupt, the owner of Sunset Construction Company No. 2

and of all of its property and assets the decree determines definitely that, in the eyes of Equity, A. E. Buckman and Sunset Construction Company No. 2 were identical. The eleventh-hour claim of appellant Rauer that the decree merely declares Buckman's trustee the owner of certain corporate stock of Sunset Construction Company could not be more clearly refuted than by the terms of the decree itself. Furthermore, if Rauer's present contention were correct, the decision of the Court that the *property* of the second company *belongs to the bankrupt's estate*, would have constituted a gross disregard of established legal and equitable principles.

Bauernschmidt v. Bauernschmidt, 60 A. (Md.) 437;

Peckett v. Wood, 234 Fed. 833 at 838;

United States, etc., Trust Co. v. Delaware Western Construction Co., 112 S. W. (Tex.) 447;

Machen v. "The Modern Law of Corporations", Sec. 1088;

Huber v. Martin, 105 N. W. 1031 at 1135;

Donovan v. Purtell, 216 Ill. 629;

In re Rieger, 157 Fed. 609 at 613;

In re Berkowitz, 173 Fed. 1013;

Lunn & Laine Timber Co., v. United States, 196 Fed. 593.

It is, of course, only in equity that a stockholder is ever deemed the owner of corporate property in so far as outsiders are concerned,—and then only in cases where, as in the case at bar, equity looks through corporate form to substance and concludes that the corporate entity is a mere shield to hide the activities of an individual. However, a Court of Equity is quick to sense the true situation.

The case of *Bennett v. Minnott*, 28 Or. 338 at 345, decided by Justice Bean, now of this Court, well illustrates the rule:

“Under the proofs in this case it is apparent that Minnott was in fact the corporation and the corporation was Minnott. He caused it to be formed, was the president, general manager, treasurer and owned practically all the subscribed stock at the time the pretended transfer was made. He made the contract between himself as an individual and the corporation, acting for both parties, and conducted the business practically the same after as before the incorporation, using the proceeds for his own benefit. Under these circumstances, although the corporation was organized in due form of law and has a valid corporate existence the legal rules which regard it as an entity distinct from the real parties in interest and its stock as property subject to sale under execution must go down in this attempt to consummate a fraud by legal forms. Equity is not bound by the rules of law in this respect when such rules would permit fraud to triumph. ‘In equity’ says Morawitz, ‘the conception of the corporate entity is used merely as a formula for working out the rights and equities of

the real parties in interest, while at law this figurative conception takes the shape of a dogma and is often applied rigorously without regard to its true purpose and meaning. In equity the relationship of the shareholders is recognized wherever this becomes necessary to the attainment of justice.' Morawetz, Corporations, Sec. 227 and cases cited."

The application of this doctrine to the case of a bankrupt is made in the case of *re Rieger*, 157 Fed. 609 at 613. There a party conveyed property to a corporation which he owned absolutely. He then went into bankruptcy. The Court held that the corporate property was the property of the individual, (exactly as the Court has done in the instant case), and that the Bankruptcy Court, in the exercise of its summary jurisdiction, was justified in ordering the seizure of the property and its delivery to the trustee in bankruptcy.

In the *Reiger* case, *supra*, the Court says:

"The fiction of the legal corporate entity cannot be so applied by the partners as to work a fraud on their creditors, or hinder and delay them in the collection of their claims and thus defeat the provisions of the bankrupt act. The doctrine of corporate entity is not so sacred that a Court of Equity, looking through form to the substance of things may not in a proper case ignore it to preserve the rights of innocent parties or to circumvent fraud."

See also,

In re Berkowitz, 173 Fed. 1013.

The principle here involved is graphically stated in *Bank v. Trebein Co.*, 59 Oh. St. 316 at 325, (52 N. E. 834), where the Court says:

“The corporation was in substance another F. C. Trebein. His identity as owner of the property was no more changed by his conveyance to the company than it would have been by taking off one coat and putting on another. He was as much the substantial owner of the property after the conveyance as before and had substantially the same use of it as if the conveyance had not been made.”

But the case of overwhelming authority is the *Lunn & Laine Timber Company* case, decided by this very Court in 196 Fed. 593. There this Court cites most of the authorities which we have listed above, and announces in decisive language its adherence to the rule for which we contend. To refresh the Court's recollection we will refer to the following language in its decision:

“If in any conceivable case a Court of Equity should look through form to substance it should do so in a case like this. The corporation is Smith. It is Smith seeking shelter behind articles of incorporation and invoking the legal fiction of a corporate entity for his protection in the perpetration of a fraud.”

In the case at bar, appellant's collusion with the bankrupt having been clearly established by the evidence, it is clear that he stands in the same position as the bankrupt and can no more rely upon the corporate fiction than could Buckman.

In all of the cases cited the corporation in question was a properly organized corporation and had regularly issued its stock in consideration of the conveyance to it of the bankrupt's property. In the instant case the facts are even stronger. Sunset Construction Company never issued its stock in consideration of anything ever conveyed to it by anybody. Buckman caused a corporate charter to be issued in the corporate name and then adopted and used that name to cover up his personal transactions. The corporation was never more than a mask,—a thing without substance or property,—and was used by Buckman merely as his other self.

**THE MOTION TO DISMISS THE APPEAL FROM THE SO-CALLED
"INTERLOCUTORY" DECREE.**

The "Interlocutory" Decree is a final determination as to the identity of Buckman and Sunset Construction Company and therefore, no appeal having been taken therefrom within the time allowed by law, all matters covered by said Decree, (save the accounting), have been finally settled and determined as to all parties.

The bill of complainant alleges (Tr. p. 3):

"That said corporation was organized as a cover for the activities and operations of said A. E. Buckman, and for the purpose of concealing the identity of said A. E. Buckman under the form, and legal entity and name of said corporation. * * * That said organization and formation of said corporation amounted to nothing more than the placing in a corporate form of the capital of said Buck-

man and his abilities as a general construction contractor.”

The decree holds (Tr. p. 15.):

“That A. E. Buckman at all times and up to and on the 19th day of February, 1915, was the owner of the Sunset Construction Co., a corporation, and of all the property, books and records of said company, and that on said last mentioned day said company, property, books and records vested in and became and now are, the property of R. Cords, Jr., as trustee of the estate of A. E. Buckman, bankrupt. * * *”

The allegations of the bill and the evidence fully support the holding of the decree.

If Sunset Construction Company had had even a *de facto existence*, a decree could not have been justified which finds and determines that all of its assets belonged to and should be retained by Buckman's trustee in bankruptcy for the benefit of Buckman's personal creditors. In other words, were the corporation a separate entity, Buckman's trustee would have only been entitled to the stock owned by Buckman, and the corporation would necessarily have continued to own and control its own assets, outside of the Bankruptcy Court. A receiver might, it is true, have been appointed, but his trust would have been for the benefit of Sunset's creditors as distinguished from Buckman,—whereas the decree in this case by its very terms, must be held to obviate that distinction and to

hold that Sunset's creditors were Buckman's creditors, and vice versa.

Therefore, since the decree is without ambiguity on this point, the question of the sufficiency of the evidence to support it was a question for this Court only in case an appeal had been taken in time. Assuming that the decree was equitable or contrary to the evidence, (both of which claims we earnestly dispute), nevertheless these matters were only reviewable on appeal. We therefore regret that we have been forced to enter into an elaborate discussion of an issue which was finally settled for all time in 1916, the year in which the interlocutory decree became final as to all matters thereby determined,—a decree “interlocutory” only in the sense that it provided for the taking of accounts.

The accounting provided for does not in any manner qualify or limit the right of the trustee in bankruptcy to take and hold the assets which are decreed to belong to him.

In *Fogary v. Conrad*, 6 How. 201 at 204, the Court said:

“The case before us is a stronger one for an appeal than the one last mentioned. For here the decree not only decides the title to the property in dispute, and annuls the deeds under which defendants claim, but also directs the property in dispute to be delivered to the complainant and awards execution. And according to the last paragraph of the decree, the bill is retained merely for the purpose of adjusting the accounts referred to the Master. In all other respects the whole of the matters brought

into controversy by the bill are finally disposed of as to all of the defendants, and the bill as to them is no longer pending before the court, and the decree which it passed could not have been afterwards reconsidered or modified in relation to the matters decided, except upon a petition for a rehearing, within the time prescribed by the rules of this court regulating proceedings in equity in the Circuit Courts."

See also:

Street on Federal Equity Practice, Vol. II,
Sec. 1937 and United States Supreme
Court cases cited to the text.

The case at bar is very similar to the case *in re Rieger*, 157 Fed. 609 (approved by this Court in *Lunn v. United States*, 196 Fed. 593), wherein the Bankruptcy Court ordered the Trustee in Bankruptcy to seize the property conveyed by the bankrupt to a corporation which the bankrupt owned and controlled and ordered that, upon the seizure being made, the Bankruptcy Court should adjust the conflicting rights of the individual and corporation creditors. The adjustment of mutual claims is primarily a task for the Bankruptcy Court. But, in the instant case, which was brought in a Court of Equity by the bankrupt's trustee, the Master in Chancery was charged with the task. The District Court might just as well, in the exercise of its discretion, have ordered the Referee in Bankruptcy to perform that duty. Either course was perfectly proper. The accounting was not an integral part of the relief sought by the complainant and is

entirely incidental to the main purpose for which the action was brought.

It is perfectly clear from Judge Van Fleet's oral opinion (Tr. p. 201), that the Court considered the decree a final one:

"The complaint alleged, as I have indicated, that the property in question belonged to the bankrupt and that for the purpose of concealing it from his creditors, he organized a corporation, in which he held the entire amount of stock, which corporation was organized as a mere cloak under which he managed the property, and that it was his individual property although ostensibly held in the name of the corporation. * * * The decree fully meets the ultimate issues presented by the pleadings; that is that this property, (leaving out the recital of the facts upon which the conclusion is based) was the property of the bankrupt, and when the court decreed that it was the property of the bankrupt it decreed that the evidence sustained the facts alleged in the complaint which warranted that decree. * * *"

The Supreme Court of the United States has held consistently that the title given to a decree shall be disregarded in determining its effect and that if it be in reality a final decree, appeal therefrom must be taken as provided in the statute. It has been held again and again that a decree is final and appealable even though the Court reserves control of the property in controversy pending an accounting between the parties to the litigation.

In *Winthrop Iron Company v. Meeker*, 109 U. S. 180, the decree, having first set aside a conveyance

as fraudulent, thus settling the property rights involved, ordered an accounting of all profits realized by the defendant in connection therewith. At p. 183 the Court says:

“In our opinion the decree as entered is a final decree within the meaning of Section 692 of the Revised Statutes regulating appeals to this Court. The whole purpose of the suit has been accomplished. The lease * * * has been cancelled. * * * In order that the receiver may perform his duties, the defendants are required to turn over to him the entire property and records of the Company. The accounting ordered is only in aid of the execution of the decree, and is no part of the relief prayed for in the bill which contemplates nothing more than a rescission of the authority to execute the fraudulent lease, or a cancellation of the lease if executed, and a transfer of the management of the affairs of the company * * * to some person to be designated by the Court. The litigation of the parties as to the merits of the case is terminated and nothing now remains to be done but to carry what has been decreed into execution. Such a decree has always been held to be final for the purpose of an appeal.”

Obviously, the so-called “*interlocutory*” decree was a final decree, and no appeal having been taken therefrom within the time allowed by law, Rauer’s present attempt to criticise it comes too late, and the appeal therefrom must be dismissed. In any event, this Court must ignore each and all of the points which Rauer attempts to make in connection with the “*interlocutory decree*”, confining its attention to the insignificant matters discussed by

appellant in his brief relative to certain items involved in the accounting.

Rauer's failure to appeal in time from the "interlocutory" decree was neither inadvertent nor due to a misconception on his part as to its meaning.

We have referred to Rauer's present construction of the "interlocutory" decree as "an eleventh-hour contention". It is demonstrated by the record in this case that until the very last he acquiesced in our construction,—the only possible construction of the "interlocutory" decree. Not only did he deliver up the assets of Sunset Construction Company No. 2 in accordance with its directions, but also he later purchased certain of these same assets in the Bankruptcy Court. Clearly, no act on Rauer's part could more plainly confirm our construction of the decree than his purchase in the Bankruptcy Court of the assets of Sunset Construction Company from the trustee of A. E. Buckman, bankrupt. It is difficult for us to see how Rauer could more surely demonstrate his acquiescence in the conclusion of the Court that Buckman's company was a mere shell, than to pay out money to Buckman's trustee for property which could only constitute a valid purchase in the Bankruptcy Court provided Buckman and Sunset No. 2 were identical.

Rauer first undertook to foreclose the chattel mortgage given to secure the notes of the Sunset

Construction Company in the State Superior Court at San Francisco. He says (Tr. p. 279.):

“I brought an action in the Superior Court of San Francisco to foreclose that chattel mortgage. The defendants gave me a voluntary appearance in that action. It is stipulated that the action was filed June 22, 1916, that the defendants in the action gave a voluntary appearance on the following day, and that on June 24, 1916, a decree was entered in the action by consent of the parties.”

The decree witnessed that the personal property given as security under this mortgage, “is now of the value of \$7,500”, and Rauer credited this amount on the notes secured by the mortgage. Although he later withdrew said credit when the collusive State decree was set aside in the Bankruptcy Court, nevertheless it is significant since it can hardly be supposed that Rauer would have given Buckman credit for anything like the true value of the mortgaged property.

When Judge Van Fleet gave his decree (the so-called “interlocutory” decree) declaring that the personal property secured by the mortgage belonged to Buckman and passed to his estate in bankruptcy, we find Rauer making his petition to the Bankruptcy Court to have a resale of the same property in bankruptcy. (Tr. pp. 282-283.) The petition was granted and upon the resale the property realized only \$3,750. (Tr. p. 367.) The property was bought in at bankruptcy sale for Rauer by

another of Rauer's dummies, with the result that he saved some \$3,750, by assenting to follow the decree. Thus it is manifest that Rauer readily acquiesced in our construction of the decree when such course was to his advantage,—whereas he now has the temerity to attack the decree, coolly taking a position with reference thereto as inconsistent with his former position as it is unwarranted by the facts.

Rauer's Anomalous Position.

It is plain that the mere fact that Rauer was owed money by Buckman, or his company, can give Rauer no better standing or greater right to the assets of the bankrupt than any other general creditor would have. Obviously, the whole question rests on the determination of a single fact, viz: Were the moneys, which the Master reports due from Rauer to the estate in bankruptcy, assets of the bankrupt which were subject to any Rauer lien? Clearly, they were not, and therefore Rauer cannot complain because he is required to pay them into the bankrupt's estate in order that they may be available to the general creditors.

The argument made by counsel to the effect that no creditor represented by the plaintiff in this case parted with value because of the transactions of Rauer with Sunset No. 2, and that therefore Buckman's general creditors have not been injured by his conduct, is wholly specious. The test of the rights of the general creditors has no such founda-

tion. Their rights are measured by the assets of the bankrupt subject to distribution between them, and Rauer's conduct in draining the bankrupt's estate of these assets through his dealings with Buckman's dummy corporation must inevitably infringe their rights, to the full extent that the bankrupt's estate was depleted.

Moreover Rauer's palpable attempt to make it appear that he has been done a "grave injustice" by the "interlocutory" decree is but another instance of an attempted collateral attack upon it, which must fail for the reason already discussed, viz: The so-called "interlocutory" decree is a final decree as to all matters covered thereby, save the accounting.

If it were possible for Buckman in any way to assign or transfer his assets, whether with or without consideration,—without any sanction, ratification, or confirmation by the Bankruptcy Court,—it would be possible for any bankrupt to deal at his pleasure with his assets, after bankruptcy, in such manner as to deprive his general creditors of any hope of sharing in his estate.

As to the holding in the "Interlocutory" Decree that all of the issued and outstanding stock of Sunset Construction Company was the property of A. E. Buckman and passed to his Trustee in Bankruptcy.

As we have already pointed out, the appellant is in no position to criticise the holding of the "interlocutory" decree on this subject. The decree is

final and was never appealed from as required by law. However, the matter is so strenuously argued in Rauer's brief that we deem it proper that we should point out to the Court the salient fact that appellant has no cause for complaint in this matter, since long prior to the commencement of this action he had parted with any right which he might have had to the stock in question.

We could go into the law and facts fully, and thus show that there was ample justification for the holding of the decree with regard to the Sunset stock. However, detailed analysis of the situation would only prolong this brief beyond reason. Rauer in his answer to the bill alleges affirmatively that the stock in question was pledged as security on a note for \$20,000, executed to him by Buckman. He further alleges (Tr. p. 9):

“On the 12th day of August, 1914, the said defendant J. J. Rauer sold said 10,150 shares of the capital stock of the Sunset Construction Company to satisfy in part the indebtedness to him of the Sunset Construction Company; that said stock was sold for the sum of \$50.00 to H. Wehrle and thereafter the said H. Wehrle sold and transferred said 10,150 shares of stock to the defendant J. A. Meadows, sued herein as the defendant John Doe Meadows and the said J. A. Meadows ever since the sale to him of said shares of stock has been the owner and holder thereof.”

And, also:

“Defendants respectfully represent that said shares of stock of Sunset Construction Company now owned and held by J. A. Meadows

have no market value and had no market value at the time of the sale thereof by the said J. J. Rauer to foreclose the pledge thereof as aforesaid." (Tr. p. 12.)

Upon the trial, the fact that the stock was valueless was proved. It was stock in the corporation which lost its charter in 1911. Furthermore, Rauer alleged and later testified flatly and positively that he had sold the stock for the sum of \$50.00. (Tr. p. 233.) Even if we assume that the stock in question had real value and even if we assume, further, that the so-called "interlocutory" decree was erroneous in so far as it declared the title to said stock in Buckman's trustee, appellant Rauer can hardly be heard to complain of such ruling. There is not the slightest effort on the part of either Rauer or Meadows, nor is there any testimony in the record given by either of them, to support the view that Rauer ever had, or claimed, any interest in this stock other than as pledgee. Rauer testified that he had foreclosed the pledge under which the stock was held and sold it out to Wehrle for \$50.00, and that he had received that sum and still retains it. (Tr. p. 233.) His claim was and is that Meadows acquired it from Wehrle and he testifies positively:

"I did not become the owner of that stock."
(Tr. p. 233)

Obviously, his interest in the stock terminated on the foreclosure sale and no one is in a position to complain on this branch of the case, save Meadows, the alleged purchaser.

The defendant Meadows, has not appealed from the decree and is not before this Court. He has never objected to the decree rendered by the lower Court and he is not objecting to it now. Apparently, owing to the complete lack of any value in the stock, Meadows is indifferent as to its fate. At any rate, Rauer cannot complain of the decree on this score.

A similar question was considered in the case of *Bennett v. Minnott*, 28 Or. 339 at 348, where the decision was written by Bean, C. J.,—now a judge of this Court. In that case it appeared that a merchant had made a fraudulent conveyance of property to a corporation, which conveyance was set aside by the lower Court. The corporation appealed and showed that the merchant's wife had purchased certain of the corporate stock for a good consideration, claiming that this act validated the conveyance to the corporation. It appeared that the wife was a party defendant, but had not appealed from the judgment of the lower Court. Judge Bean disposes of the point in the following language:

“If this be true, it is not apparent how it can benefit the Hardware Company on this appeal. Mrs. Minott has not appealed and the only question between the Hardware Company and plaintiff is the validity of the sale and transfer by Minott of his stock of hardware to the corporation.”

See, also, *Lunn and Laine Timber Co. v. United States*, 196 Fed. 593 at 600, a case decided in this Circuit, where the Court says:

“It is suggested that the fraudulent transfer should be upheld in this case for the reason that a small portion of the stock of the corporation has been purchased by an innocent third party, and that a portion of the stock has been pledged as security for a loan, but it has never been held that a corporation which is not itself an innocent purchaser of property can defend a suit to recover property on the ground that its stockholders subscribed to or purchased their stock in good faith and in ignorance of the fraud. The contrary has been held by this Court in *Wilson Coal Co. v. United States*, 110 C. C. A. 343.”

**STATEMENT OF FACTS RELATING TO THE APPEAL FROM THE
“FINAL DECREE”.**

The “final decree” in this case is really nothing more than a decree confirming the report of the Master in Chancery upon the accounts which were referred to him for settlement. The Master took particular pains to adjust these accounts fairly and rendered his original report in draft form so that the parties to this action might have an opportunity to make their respective objections thereto before a final report was rendered. Objections to this draft report were made by Rauer and argued at length and the report was modified in several important particulars. The draft report appears in the transcript at page 19 and following, and the supplemental or final report on page 59 and following. In these reports the Master has carefully detailed the facts regarding the matters in con-

troversy and it would be useless to re-state them at length in this brief. Accordingly we will refer to the Master's report and confine ourselves to such further statements of fact as are required to meet the unfair and misleading allegations contained in Rauer's brief.

Rauer has centered his attack on the items which the Master allowed the Trustee in Bankruptcy as being bills receivable, belonging to the Sunset Construction Company at the time of Buckman's bankruptcy and thereafter collected and retained by Rauer. These items are listed in the Master's Report (Trans. 76) and total \$13,023.19. Most of the items pertain to separate transactions.

ITEM OF \$5,381.79 BEING $\frac{1}{2}$ FEDERAL CONSTRUCTION CO. PAYMENT.

The report of the Master contains a very full statement respecting this item (Trans. 48-73.) Rauer states that his "main complaint" against this allowance (and the two others discussed next in order), "is that Rauer is not allowed a credit for the alleged rental against the mortgage indebtedness." (Brf. 60.)

The Master bases his allowance of the foregoing item on two grounds (Trans. 50), the first and more important of which is not even mentioned in Rauer's brief. The first ground upon which the Master makes this allowance is, in and of itself,

sufficient to support his conclusion and, if Rauer objects to the conclusion, he certainly should make a showing that the allowance was not justified upon that ground. This he does not even attempt to do and we thus take it that the first ground upon which the allowance is made is impregnable to Rauer's attack.

The second theory upon which the allowance is made is that Rauer used the machinery and equipment of the Sunset Construction Co. as the quid pro quo for the money paid to him as assignee of Buckman, by the Federal Construction Co. This was the machinery which was covered by the lien of the chattel mortgage executed by the Sunset Construction Co. to H. Wehrle (brother-in-law and dummy for Rauer) in June, 1914. (Trans. 279.) This mortgage was given as security for notes aggregating \$15,000 and witnessing the same indebtedness as notes theretofore executed to Rauer in the respective sums of \$15,000 and \$20,000. They were *triplicate* evidences of the same indebtedness. (Trans. 278-9.) On July 22, 1916, Rauer filed a complaint in the Superior Court of San Francisco, to foreclose this mortgage. (Trans. 364.) Buckman had been adjudicated a bankrupt before the complaint in foreclosure was filed, and the very action involved in this appeal was pending at that time. (Trans. 7.) However, Buckman and the other defendants made a voluntary appearance in the action and two days after the complaint was

filed a consent decree was rendered turning the machinery over to Rauer. (Trans. 279.) The decree so made was void against these proceedings and Rauer conceded as much when he petitioned the Bankruptcy Court in December, 1916, to permit him to sell the same property. (Trans. ~~244~~)

Appellant assumes that Rauer had possession of this equipment at all times after bankruptcy, but there is nothing in evidence to show that such possession was taken until immediately before the decree of the Superior Court was rendered. (Trans. 364.) He retained possession until title passed to him under sale in bankruptcy in December, 1916.

Moreover, the possession of the equipment which Rauer took was merely colorable for within two months after that possession was secured he executed to Buckman an option agreement wherein he agreed to sell the sand machines to Buckman for \$2500, and to credit upon the purchase price "any money received for the use of said machines." (Trans. 370.)

The contract with the Federal Construction Company was fully completed in January, 1916, (Trans. 354) *which was long before the time when Rauer took possession of the equipment* under the chattel mortgage. At that time his mortgage was a mere naked lien unaccompanied by actual possession.

Rauer argues in his brief (p. 63) that he credited moneys received from the use of the mortgaged

machinery upon the mortgage indebtedness. What he actually did appears from his own testimony (Trans. 367):

“I gave Buckman credit for money received on the San Bruno Avenue job on the general running account.”

The Master treats the San Bruno contract as though it were made, in part, to cover the value of Buckman's services. There was some testimony to the effect that the original agreement contemplated certain services being rendered by Buckman but the evidence shows that he actually rendered little or no service and that, so far as there was any real consideration for the contract, it lay in the use of the machinery and equipment which belonged to Buckman's alter ego, the Sunset Construction Co.

S. P. Doyle, cashier of the Federal Construction Co., testified (Trans. 355):

“Our superintendent reported a number of times that Buckman was not on the job and when we complained about it to Mr. Buckman, he said, ‘I have other work to do.’”

J. A. Dowling, president of the same corporation, says (Trans. 359):

“When we started the job originally he (Buckman) started to do a little work there, and we assumed he knew what he was doing. We found out very shortly afterwards that he did not, and we put our own superintendent out on the job, ourselves, to run the work,
* * * .”

Rauer recognized these conditions when he asserted his claim as assignee of Buckman for the moneys due to Buckman under this agreement with the Federal Construction Co. and filed a stop notice with the county auditor of the City and County of San Francisco, directing him to withhold from moneys due to the Federal Construction Co. sufficient to satisfy the amount of Rauer's claim. This notice to withhold appears in evidence (Trans. 356) and witnesses the character of the claim made by Rauer, the fact that he is the assignee of Buckman and alleges that the claim is for:

“the hiring, rental, use and consumption of equipment and material used in the grading and sewerage of San Bruno Ave., * * * .”

ITEM OF \$1,164.07 BEING RENTAL OF EQUIPMENT ON TARAVEL STREET JOB.

The Master discusses the facts relative to the Taravel Street job in both his draft and supplemental reports. (Trans. 44-66.) The Taravel job was taken in Rauer's name, and he held that contract during the whole time that work was in progress on it. He used the equipment belonging to the Sunset on that job. (Trans. 366.) Accordingly Rauer is charged with the reasonable rental value of the machinery which he used.

But Rauer now complains that the Master refused to allow him the amount of expenditures made by him during that time to keep this equipment in

repair. The Master himself answers this contention very effectively (Trans. 66) and clearly states the reasons why the allowance has not been made.

The Master says bluntly, referring to Rauer's purported vouchers,

“The numbered vouchers to which counsel refers in his brief are not in evidence.”

Neither are they included in the statement on appeal. They are only included in the “observations” or exceptions to the Master's report made by Rauer, a document of his own composition.

The rules of this Court provide that where evidence is offered and rejected (Rule 11) the full substance of that evidence must be quoted in the assignments of error, otherwise the appellant is not entitled to object, on appeal, to the ruling rejecting that evidence. Yet Rauer has not mentioned this rejected evidence in his assignments of error herein, although the same are most voluminous, and he has taken no exception to the ruling.

In this respect we quote Rauer's testimony, (Trans. 368):

“I could not estimate what I paid out for repairing the sand machines.”

He also attempted to establish a bill for \$499.40 as a voucher for an expenditure made by him, and the Master, on examining the bill, found that it was nothing more than a receipt for a deposit which was returned to Rauer. (Trans. 369.) So

the Master may be pardoned for refusing to consider unreceipted bills as evidence of payments made by Rauer.

Rauer also claims that he paid \$2,200 in royalties to the owner of the patents on the sand machine and infers that Buckman agreed to reimburse him for these royalties. He does not point out any such evidence in the statement upon appeal and we find none there. However, we do find a statement of account between Buckman and Rauer (Trans. 333-334), covering a very considerable period of time, after the date when Rauer took possession of the equipment and *neither repairs nor royalties are billed against Buckman on that statement.* Rauer does claim \$1500 for the sand machines and \$1000 for the patent rights, which agrees with the amount named as selling price mentioned in the option agreement. (Trans. 370.) This indicates that Rauer himself owned any patent rights that may have attached to these machines and agreed to sell those rights to Buckman for \$1000. But there is no evidence to support the claim that Buckman ever agreed to pay royalties to Rauer or anyone else.

That the amount charged Rauer is the reasonable rental value of the machinery appears from the testimony of McCoy and Simmie (Trans. 341-2), and from Rauer's own testimony. (Trans. 366.)

ITEM OF \$2,461.13 BEING MISCELLANEOUS COLLECTIONS OF
RENTALS.

A portion of the income which Rauer secured from the use of the machinery and equipment mortgaged to him consisted of rentals paid to him by various contractors who rented this machinery from Buckman. There was a great deal of this machinery and Buckman seldom had use for all of it at the same time. Accordingly he was constantly renting it out to others who had use for it and the rentals so secured amounted to a considerable sum. Certain of these rentals were collected by Rauer during the time when Buckman possessed the property, and certain were collected after it passed into the hands of Rauer. Rauer has not segregated the amounts collected during these respective periods and we will not attempt to do so.

Our contention is that Buckman possessed an equity in this machinery which constituted an assignable interest therein,—that this interest passed to the Trustee in Bankruptcy at the time when Buckman was adjudicated a bankrupt—that the collusive decree of the Superior Court under which Rauer took possession of the machinery was void as against the proceedings in bankruptcy and conferred no rights whatever upon Rauer; and that Buckman's trustee was entitled to the rentals received for the use of this machinery up to the time when it was sold under the authority of the Court in Bankruptcy.

**ITEMS AGGREGATING \$1,607.20 FOR MISCELLANEOUS
COLLECTIONS.**

These collections are listed as follows (Brf. 70):

Academy of Science	\$300.	
Reeder & Foster	407.20	
Bosworth	400.	
Iverson	500.	1,607.20

Rauer argues his objections to these items by mere reference to his own "Observations on Master's Report," which appears in the transcript but which is, in reality, little more than a brief filed by Rauer in the lower Court. In regard to the Academy of Science job he does refer to the statement on appeal (pp. 309, 337, 338, 339), but overlooks any reference to page 374.

The hostile witnesses who were examined upon the subject of this transaction did their best to conceal the truth, but, towards the conclusion of the case, Filmore Buckman testified as follows (Trans. 374):

"We had a contract with the Academy of Science at Golden Gate Park which was finished *before* bankruptcy. *After* bankruptcy we did some extra work there but the extra work was done for a percentage over cost. The ledger of the Sunset Construction Company shows that J. J. Rauer collected \$300 as a *balance upon the original contract*. That had nothing to do with the extra work."

This tells the whole story and shows that Rauer's contention that this \$300 was paid for work done

“after bankruptcy” is a falsification of the facts attempted to be made by the confusion of two different contracts.

The misrepresentation of fact in the case of Reeder & Foster (mistakenly called Reeder & Ryder in Rauer’s brief), is equally gross. Rauer claims that this was for team hire done four months after bankruptcy. He says:

“The statement on p. 335 ‘in full for *Jan.* team hire’ is a clerical error and should be *June.*”

This is not so. Rauer’s brief entitled “Reply Brief on Accounting,” page 49, filed with the Master, quotes an assignment made of this account as follows.

“*Jan. 21, 1915.*

For value received we hereby assign, sell, transfer and set over to J. J. Rauer all money due or to become due us from Foster Vogt Co. for team hire, and we do direct said Foster Vogt Co. to pay said moneys to said J. J. Rauer.

Sunset Construction Co.

By A. E. Buckman, Gen. M.”

The Master shows that “Reeder & Foster” is probably another name for Foster Vogt Co., used by Rauer to confuse his account. This assignment is dated *before bankruptcy* and its date is the same as that shown in the ledger of the Sunset Construction Co. (Trans. 335.)

Filmore Buckman testified (Trans. 312):

“That first item, July 6th, Reeder & Foster, \$407.20,—I checked off that first item I think, as being an item which was an asset of the Sunset Construction Company, prior to the date of the bankruptcy. And that is true about the item under date of January 15, 1916, order of Bosworth, \$500.”

The item of “Bosworth—\$400,” is explained by the testimony of Filmore Buckman, above quoted. Elsewhere he testified that the Iverson item, \$500, covered a bill receivable by the Sunset Construction Company, at the date of bankruptcy, which was not actually collected until after bankruptcy. (Trans. 301.) Rauer admits the truth of this testimony in his exceptions to the Master’s report (Trans. 149), where he says in reference to this item:

“These arose out of work completed by the Sunset Construction Co. previous to February 19, 1915, (the date of bankruptcy), and these accounts were assigned to the defendant Rauer, whether before or after February 19, 1915, does not appear from the evidence, but they were collected by Rauer after February 19, 1915.”

If the assignments mentioned by Rauer are not in evidence, who is to blame? The plaintiff here never possessed such assignments but they were given to the defendant Rauer. If Rauer wanted to put those assignments in evidence he had the privilege of doing so, and the inference is that he

didn't put them in evidence because his interests would not be served by such action. The duty was on Rauer to exhibit those assignments or account for their loss. He did neither and cannot complain because of their absence from the record.

**ITEMS AGGREGATING \$2,409.00 BEING FOR GRADING WORK
DONE ON 14th AVE. & B STREET.**

The story of the transaction whereby the bills due for a grading contract performed by the Sunset Construction Co. at 14th Ave. and B Street were collected by Rauer and retained by him, is well told by the Master in his report. (Trans. 39-72.)

Rauer in his characteristic fashion, argues his objections to these items by mere reference to the argument made by him in his exceptions to the Master's report. Those exceptions were prepared long before the Statement on Appeal.

Consequently the references made in those exceptions are to the pages of the typewritten transcript prepared by the reporter. Some of this evidence was incorporated into the Statement on Appeal and some of it was not, but in no case can the reference to the typewritten transcript be used in locating evidence incorporated in the printed transcript before this Court. We protest against this method of arguing an appeal as being unfair to counsel and the Court.

The contention of Rauer is that this money was paid to him for paving the street at 14th Avenue and B Street and he affirms that the Sunset Construction Co. had nothing whatever to do with this paving contract. (Trans. 150.) He states further, that the Sunset Construction Co. had finished a *grading* contract on this same street shortly before the *paving* contract was commenced and that the Master has confused the moneys paid under the paving contract with those paid under the grading contract. Rauer concedes (1) that he received the money in question, (Trans. 320-1); that the grading contract was completed by the Sunset Construction Co. before bankruptcy and that the proceeds thereof constituted assets of Buckman, (Trans. 150); and we concede that the moneys paid for the paving work were moneys due to Rauer and was for work done after bankruptcy. The only point at issue is whether these moneys were paid for grading work or for paving work.

Rauer states that his contention is (Trans. 153) that the moneys were paid

“in payment of Mr. Rauer’s bill for paving and not in payment of the Sunset Construction Company’s bill for grading; and Mr. Rauer testifies that this is the fact.”

Filmore Buckman testified that the “Black Book” contained true entries of all transactions mentioned in it and that “all the entries made by me in the Black Book were transactions of which I had personal knowledge and are correct entries.”

(Trans. 295.) If we turn to this book (Trans. 331), we find the following:

"May 25, 1915.	Pd. J. J. Rauer Ck. B. Dufau	20.
	" " " Ryder	306.70
	" " " Meyer	3148.04
		<hr/>
		3474.74
S. C. Co. Ck. taken up	6245	1000.
	6190	1000.
	8256	330.50
	5759	500.
Int.		563.80
		<hr/>
		3394.30"

This transaction must be considered in the light of the evidence to the effect that it was the custom of Rauer to take checks to witness the amount due to him from the Sunset Construction Co. and to hold these checks without cashing them (as there was no money in the bank) until such time as they were taken up by payment made direct to him by the Sunset Construction Co. The checks were in reality nothing but a peculiar form of promissory note. The Master describes this method of doing business. (Trans. 25.) Consequently when the Sunset made a payment to Rauer they took, as receipt for that payment, these unpaid checks (or notes) sufficient in amount to equal the amount by which the principal of the indebtedness was reduced. So the foregoing book entry shows that the principal of Rauer's claim against the Sunset was reduced in the amount of \$2,830.50 and \$563.80 paid upon interest due, by the checks from Dufau,

Ryder and Meyer, which were turned over to Rauer.

The numbers on the checks taken up from Rauer show that these checks were all issued prior to the date of bankruptcy as the number of the check issued on the bankruptcy date was 8631. (Trans. 335.)

Now if Rauer's contention is true and these moneys were paid by Dufau, Ryder and Meyer *upon a paving contract* in which the Sunset had no interest, why did Rauer *apply those moneys in reduction of the principal* and interest of the debt due to him from the Sunset?

The fact that those moneys were so applied by Rauer is conclusive in its effect as proving that they were assets of the Sunset Construction Co. There is no possible explanation which will in any degree mitigate the force of this evidence. If the money had belonged to Rauer he would have appropriated it to his own use without further ado. In his draft report the Master held with us on this contention (Trans. 38-41), but in his supplemental report he reduces the amount which he allows us to the exact sum which we showed, affirmatively, to have been paid for grading work done on 14th Ave., i. e.,

Dufau	\$ 20.
Ryder	245.
Meyer	649. \$914.

The amounts allowed correspond to the amounts of the bills sent out to these respective parties for the grading work. (Trans. 371-2.)

These bills were dated Jan. 22, 1915, (and following), immediately prior to bankruptcy, and the books of the Sunset show that the money in payment thereof was not collected until after bankruptcy.

Rauer mentions a transaction under date of Feb. 24, 1915, whereby a note from "Ryder" was turned over to Rauer for cash. This refers to an entirely different payment. The transaction upon which we base our claim is that mentioned in the "Black Book" under date of May 25, 1915, and quoted above.

The \$495 paid to the Sunset by the City of San Francisco for its proportion of the grading work is explained by undisputed evidence. A bill for this amount for "grading the crossing" on 14th Ave. and B St. was sent out Jan. 6, 1915 (Trans. 372), and on Mar. 10, 1915, the City paid the Sunset the amount of this bill, and the collection so made was "paid over to J. J. Rauer." (Trans. 330.) Nothing could more clearly establish the fact that this was a bill receivable by the Sunset Construction Co. at the time of bankruptcy which was collected thereafter and the moneys paid over to Rauer.

The only other matter to consider is the \$1,000 paid by Heyman to Rauer in the form of two checks, one for \$750 and one for \$250. Rauer admits receipt of these moneys (Trans. 320), but alleges that they were paid to him for work done on the paving contract. Why then did he give the Sunset Construction Co. credit for these amounts in his account just referred to?

It is an admitted fact that these moneys were paid by Heyman for work done on 14th Ave. and B Street. If the money was paid for grading work then it was paid upon an account due to the Sunset Construction Co. at the date of its bankruptcy. If it was paid for paving work then it was paid for work done by Rauer and with which the Sunset Construction Co. ^{had nothing to do.} ~~at the date of bankruptcy.~~ Yet Rauer admits in his account (1) that he collected the money, and (2) that he gave the Sunset Construction Co. credit for it on the general account. (Trans. 320.)

There is much other independent evidence to support the conclusion that the money was paid for the grading of the street. Testimony which was uncontradicted showed that the natural order in which street work is done is: first, grading; second, sewerage; third, curbing; and last, paving. (Trans. 323.) The same evidence shows that on this particular job the Sunset Construction Co. did the grading, Moran did the sewerage, Graham

did the curbing and Rauer employed the Federal Construction Co. to do the paving. (Trans. 323.)

The ledger sheet of Heyman, entitled "O. L. 297, St. Work a/c" (Trans. 325), was introduced in evidence and shows *first* these two payments of \$750 and \$250 made to "J. J. Rauer & Sunset." Immediately afterwards comes "Edw. C. Moran, sewer", and following "H. Graham." Apparently the paving account is not put on this sheet at all. Heyman appeared as a witness and declared (Trans. 323):

"On May 21st, I paid \$750 and on May 24th I paid \$250 to Rauer and the Sunset Construction Co. * * * Those payments were on the 14th Ave. contract. * * * The amounts I have read out as being paid for work on 14th Ave. are for the grading work, the paving is not entered in this account. The paving contracts were entered into with the City Street Imp. Co. or the Federal Construction Co."

Rauer confirms this statement in part by testifying that the Federal Construction Co. was paid \$5760 for paving 14th Ave. (Trans. 368.) Because the foregoing statement of Heyman was perfectly clear and consistent with the other evidence in the case the Master accepted it as a true statement of fact. Afterwards Heyman modified his testimony in some very important particulars but the inconsistency was resolved by the Master in favor of the statement quoted above and which is un-

doubtedly the correct statement. Where testimony is conflicting the judge who actually sees the witness on the stand and hears the testimony which he gives is the one who is best fitted to decide which one of the two conflicting statements is closer to the truth.

**THE EVIDENCE FULLY SUPPORTS THE FINAL DECREE MADE
IN THIS ACTION.**

The right of the trustee to take the assets of a bankrupt which belong to him at the time of his bankruptcy are so numerous and decisive that any discussion of such a proposition before this Court would be absurd. That this right cannot be obstructed by the formation of a dummy corporation to hold the bankrupts assets is a proposition of law which has already been fully discussed.

There is, therefore, no necessity of discussing here the law in relation to most of the allowances which were made to plaintiff by the Master as representing bills receivable belonging to Buckman on the date of bankruptcy and thereafter collected by Rauer to the prejudice of the balance of Buckman's creditors.

We shall, however, discuss the special case where the assets so collected represented the income, rental or other consideration for the use of machinery and equipment covered by the chattel mortgage executed by the Sunset to Rauer's dummy, Werhle.

The Trustee's right to the income derived from the machinery and equipment of Sunset Construction Company No. 2.

This machinery and equipment were not sold in the Bankruptcy Court until December 7, 1916. Until that time title remained in Buckman's trustee. It therefore, follows that the rents and profits of the mortgaged property, accruing prior to the sale, were part of the estate in bankruptcy and must be distributed to the general creditors. For it was not until the sale in bankruptcy that the mortgagee secured title.

See *In re Brose*, 254 Fed. 664 and authorities hereinafter cited.

The filing of the petition in bankruptcy operated as a caveat and injunction against the entire world, and all property then possessed by the bankrupt or held for him by any third person, became a part of his estate in bankruptcy. This doctrine has been established by the Supreme Court of the United States in a series of decisions:

See *Mueller v. Neugent*, 184 U. S. 1;

Watts v. Sachs, 190 U. S. 1;

United States Fidelity Company v. Gray,
225 U. S. 205.

In the instant case, the evidence shows that when the petition in bankruptcy was filed, Sunset Construction Company No. 2 owned and possessed the machinery and equipment covered by the chattel mortgage executed in Rauer's favor. At that time, however, the Sunset claimed to be an adverse

claimant and, under the circumstances, the trustee was not in a position to forcibly seize the assets so held. Later, however, it was established, in effect, by the Interlocutory Decree, that the Sunset was not an adverse claimant but was then, and had been theretofore, a mere sham,—a fictitious alias for Buckman; that the property possessed by it was Buckman's property and that its possession was his possession.

The necessary consequence of this holding was that title to this machinery and equipment was established in Buckman's trustee in bankruptcy as of the date of the filing of the petition in bankruptcy.

To the general rule see:

Collier on Bankruptcy, 11th Edition, pp. 526-7;

Loveland on Bankruptcy, 4th Edition, §§57 and 410;

Murphy v. Hoffman Co., 211 U. S. 562;

White v. Schloerb, 178 U. S. 542.

The same rule covers the income derived from the machinery and equipment during the bankruptcy period. The situation with which we are immediately dealing is controlled by the law of contracts as it exists in this state and the rule governing the case must be ascertained from the decisions of its Courts. These decisions hold that the increase of profit or income from mortgaged

personal property does not pass to the mortgagee unless the mortgage itself expressly so provides.

In *First National Bank v. Errecca*, 116 Cal. 81 at 83, a chattel mortgage was placed upon a band of sheep and the question arose as to whether the wool grown on the sheeps' backs and the lambs in gestation at the time the mortgage was executed belonged to the mortgagor or to the mortgagee. The Court held these profits the property of the mortgagor as they were not covered by the terms of the mortgage. Judge Van Fleet, then on the State Supreme Court Bench, concurred in the decision.

See also:

Shoobert v. De Motta, 112 Cal. 215;

The decisions in the above cases are in accordance with the general rule.

The extent of the liability of a *mortgagee* is stated in 11 C. J. 561 as follows:

“While the right of redemption exists, a mortgagee in possession is liable to account for the income, profits and proceeds of the mortgaged chattel, and, if the nature of the property permits, he is bound to exercise reasonable diligence in keeping it employed.”

It also appears from a case in the foot note to the above citation that, when a mortgagee takes possession, he is considered in equity in the light of a trustee and is accountable for the use and profits of the mortgaged property.

See also:

Mahoney v. Bostwick, 96 Cal. 54.

In *Rodriguez de Cazara v. Orena*, 80 Cal. at 32, the syllabus, sustained by the text, reads as follows:

“A mortgagee, if he has been in possession of the mortgaged premises, or has received the rents and profits, must account for them or the value of the use and occupation.”

See also:

Bank of Woodland v. Heron, 120 Cal. 614.

In *Simpson v. Ferguson*, 112 Cal. 184, 53 Am. St. Rep. 201, the Court quotes section 670 of Jones on Mortgages as follows:

“Even if the rents and profits of the mortgaged property are *expressly pledged for the security of the mortgage debt, with the right to take possession upon default*, the mortgagee is not entitled to the rents and profits until he takes possession, or until possession is taken in his behalf by a receiver.” (Italics ours.)

In *Kountze v. Omaha Hotel Co.*, 107 U. S. 378, the Supreme court of the United States say:

“In the case of a mortgage, the land is in the nature of a pledge; and it is only the land itself,—the specific thing—which is pledged. The rents and profits are not pledged; they belong to the tenant in possession, whether the mortgagor or a third person claiming under him * * *. The taking of the rents and profits prior to the sale does not injure the mortgagee, for the simple reason that they do not belong to him.”

See:

Simpson v. Ferguson, supra and cases there cited;

Guy v. Ide, 6 Cal. 99; 65 Am. Dec. 490;

West v. Conant, 100 Cal. 231;

Freeman v. Campbell, 109 Cal. 360;

Wagar v. Stone, 36 Mich. 364;

Hardin v. Hardin, 34 S. C. 77; 27 Am. St. Rep. 786.

Thus it will be seen that, even in case the mortgagor permits the mortgagee to take possession upon default, unless and until the mortgage is lawfully *foreclosed*, the mortgagee has no lien upon the rents and profits of the mortgaged property. Clearly, all rents and profits derived by Rauer from the machinery and equipment involved in this case, accruing prior to December 7th, 1916, the date of the sale in bankruptcy,—are payable to plaintiff for pro rata distribution among the general creditors.

The possession which Rauer took of the property was subsequent to the time when Buckman was declared bankrupt and was without permission of the Bankruptcy Court. It was, accordingly, unlawful and in derogation of the jurisdiction of that Court.

Collier, "Bankruptcy," 13th Ed., Pg. 803:

"A state Court has no jurisdiction to foreclose a mortgage on the bankrupt's property

after bankruptcy has intervened without leave of the bankruptcy court and making the trustee a party."

Certainly Rauer has no right to do what the state Court cannot do, and his attempt to possess himself of the mortgaged chattels belonging to the bankrupt without notice to or authority from the Bankruptcy Court cannot confer upon him any title to the rentals received by him from letting out the property so seized. Rauer got his first and only authority to possess himself of this property in December, 1916, when it was sold to his dummy, upon his petition, by order of the Bankruptcy Court. He is bound to account for all rents received by him up to that time.

In claiming, as counsel do, at p. 67 of their brief, that the law requires a mortgagee to apply all rents, etc. received from the mortgaged property on the mortgage debt, counsel completely lose sight of the fact of Buckman's bankruptcy and the consequent right of the general creditors to share in proportion to their claims. Also, the rule mentioned by counsel can only apply to cases where the mortgagee is in *lawful* possession of the mortgaged chattel.

Where the mortgagee takes lawful possession of the mortgaged chattel before the foreclosure of the mortgage, some decisions hold that he is entitled

to apply the amount of the income to the liquidation of the mortgage debt. In order to possess this right however, he must be in *lawful* possession of the property and actually apply the amount received on the secured indebtedness. Rauer has not made any showing in this case of either of the foregoing essentials. During the short period during which Rauer had any possession of the property his possession was exceedingly colorable and really for Buckman's benefit, as the option executed to Buckman plainly shows. (Tr. p.370.) Furthermore, in every case where Rauer collected money from the rentals of the mortgaged chattels he applied the amounts collected to the *general*, and not to the mortgage account. (Tr. p.367.)

CONCLUSION.

The case at bar has been pending since Oct. 27, 1915. The appeal from the final decree was taken by Rauer more than a year ago. Rauer has been granted most extraordinary indulgence to present and argue objections. He argued the case when it was submitted to the Master; he argued it again after the Master had made his draft report, and the Master then resolved every possible doubt in favor of Rauer, (as appears from a comparison of his draft and final reports.) After the Master submitted his final report Rauer re-argued the case

before the Master and again before Judge Van Fleet. Both the Master and Judge Van Fleet were of the opinion that Rauer has profited illegitimately as a result of his unfair tactics in covering up the assets of the bankrupt. The Master says (Trans. 38), referring to him:

“The funds have been so mixed by him and there are so many items of doubt and so much in evidence to show that more of the prior assets have been received by Rauer, etc.”

And Judge Van Fleet says (Trans. 202):

“The Master, I think, if he committed any error, committed it against the parties prevailing as to the extent of the accounting required.”

The labor of meeting Rauer's persistent objections and innumerable obstructions has been monumental. For eight years he has retained the moneys unlawfully collected by him and has been charged with legal interest thereon only since December, 1921. Yet the record here shows that he lends money at usury and ordinarily receives 2% a month as interest. It is safe to say that these delays and obstructions have profited Rauer mightily.

We believe that this appeal was taken as part of appellant's studied program to exhaust the complainant with endless litigation.

We think it is high time that the penalty of appellant's devious methods should be brought home to him.

Dated, San Francisco,
November 10, 1923.

Respectfully submitted,

EDWIN H. WILLIAMS,
CHARLES S. WHEELER, JR.,
Attorneys for Appellee,
George H. Hatfield, as Trustee in
Bankruptcy of the Estate of
A. E. Buckman, Bankrupt.

No. 4091

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. J. RAUER,

Appellant,

VS.

GEORGE H. HATFIELD, as trustee in
bankruptcy of the estate of A. E.
Buckman, bankrupt, and H. M.
WRIGHT et al.,

Appellees.

BRIEF OF APPELLEE, H. M. WRIGHT,
SPECIAL MASTER.

H. M. WRIGHT,

Appellee in Person.

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BRIEF OF APPELLEE, H. M. WRIGHT, SPECIAL MASTER.

Statement of Facts.

This appellee is interested in only one of the two appeals presented, by this court's order, on the one transcript of record. With the appeal by Rauer from the final decree in favor of the trustee adopting the master's report upon the accounting, the master, appellee herein, has nothing to do.

This brief is concerned with the other appeal from the court's order fixing the special master's compensation for his services. As a preliminary to the pointing out of the very few pages of a very

long record upon which the appeal now discussed rests, I state the practice as to the fixing of master's compensation.

The fundamental rule is Equity Rule, 68, reading in part as follows:

“The compensation to be allowed to every master shall be fixed by the District Court, in its discretion, having regard to all the circumstances thereof, and the compensation shall be charged upon and borne by such of the parties in the cause as the court shall direct.”

In this district the master's compensation is sometimes covered by a stipulation of the parties covering both the amount and the party or parties chargeable, followed generally by a court's order in accordance with the stipulation. When the parties do not stipulate, it has been the practice for the master to bring the matter to the court's attention by a petition for an order. It was always Judge Van Fleet's desire that the master in his petition should state, in addition to the facts necessary to an intelligent exercise of the court's discretion, a sum deemed by the master to be just, together with a recommendation on his part as to the party or parties against whom the fee should be charged in the first instance.

The present appeal does not depend in any way upon the issue of the appeal from the decree. It is my request, and my hope, that this court may decide the present appeal promptly and not subject it to the delays necessary if it should be de-

ferred until decision of the complex issues embodied in the main appeal.

Accordingly, I point out now the documents and the pages of the record upon which the present appeal rests, as follows:

1. The special master's petition for compensation, filed January 11, 1922, Record, pages 126-128.

2. Objections to special master's petition for compensation by defendant Rauer addressed to the District Court, filed January 26, 1922, Record, pages 191-198 (apparently duplicated at Record, pages 129-136).

3. Minute Order overruling exceptions to master's report and fixing his compensation, dated September 18, 1922. Record, page 199.

4. Oral opinion of the court accompanying above minute order, rendered September 18, 1922, filed September 25, 1922. Record, pages 200-203.

5. Formal signed order overruling exceptions and fixing the master's compensation at \$1800.00, ordering that it be paid by defendant, Rauer, in the first instance within twenty (20) days from notice thereof, filed September 30, 1922. Record, pages 203-204, being the order herein appealed from.

6. Assignment of errors on appeal from last named order, filed October 14, 1922. Record, pages 380-382.

At pages 383 et seq. is the order allowing an appeal and the supersedeas bond. Other papers with respect to the preparation of the record and the perfecting of the appeal need not be noticed.

The following pages of the appellant's brief are the only ones in which this appeal is discussed:

1. Pages 9-10 stating the facts and alleging disqualification of the master by bias.
2. Pages 16-17 assigning errors in fixing master's compensation.
3. Pages 71-73 argument on appeal.

At pages 58-59, the master's disqualification by interest is also urged as a reason whereby the court was in error in entering a decree upon the master's report, a point with which this appeal has no concern.

ARGUMENT UPON ASSIGNMENTS OF ERROR I AND II.

In the special master's petition for compensation, this language occurs:

“With respect to the party against whom it is charged, it is apparent that the usual practice of this court should be followed and that it should be charged against the accounting party, namely, the defendant, J. J. Rauer. The justice of following the usual practice is apparent when it is considered that the trustee in bankruptcy is understood to have no funds in his possession and the amount found due to him from the defendant, Rauer, ought not to be depleted to the loss of the creditors in bankruptcy.”

The master here states the usual practice and might well have rested at the close of the opening sentence. What follows was a makeweight directed

to the justice of following the usual practice. It has been seized upon by this appellant as a basis for appeal.

The first assignment, designated by the appellant "exception" I, Record, page 381, states, in effect, the disqualification of the master because of financial interest in the payment of his fees.

The second assignment, or exception, Record 381, differs slightly in that it alleges that the disqualification rendered the value of the master's services nugatory and of no value.

Baldly stated, the appellant's charge here and in the court below is that the master's interest was disclosed to frame his report in favor of the trustee in bankruptcy, a party without funds, except as provided by the decree herein, and against the defendant, Rauer, a party presumably solvent, to the end that he might be sure of payment of his compensation; the assumption being that the losing party would be ordered to make the payment, as a matter of course.

The statement several times repeated in the appellant's brief (e. g., p. 72) that "it is not the intent of counsel to charge the master with conscious bias or to say he was affected by the foregoing considerations," is mere words. If it means what it says, it undercuts the objection to the report, and the charge of a biased finding. I take it that the disclaimer is only evidence of counsel's lack of courage to stand behind a very serious charge.

It will at once occur to the court (1) that it is not shown when the master gained knowledge of the trustee's lack of funds, whether before or after the report; (2) that it is not shown, and is not the fact that appellant ever urged the master's disqualification until his services were completed. These are minor points that may be passed by in the presence of a charge so serious to the integrity of the court's officer. Let us get at once to the meat of appellant's contention.

If any principle underlies the appeal, it must be general in its application. Therefore, if appellant is right, whenever an accounting is ordered to be rendered by a solvent party in favor of an insolvent party, the master must report in favor of the accounting defendant, since otherwise his report will be void for personal bias. And the implications of the theory would seem to require a charging of the master's fees to the insolvent plaintiff in the accounting, as the losing party.

In any case where a trustee in bankruptcy, having no other funds, sought to recover money that had been misappropriated from the bankrupt's estate, no valid master's report could ensue to effectuate the court's decree, unless (1) the master was ignorant of the financial responsibilities of the respective parties; or, (2) being advised, should work without pay; or, (3), a principle were established that in all accountings, the plaintiff in the accounting, rather than the accounting defendant,

should pay the master's fees out of the amount recovered for the creditors. And in the latter case, I doubt not that this appellant would charge a bias on the part of the master to make the recovery great enough to provide substantial compensation for himself; and incidentally, that the report rendered would therefore be void.

Appellant's contention is thus shown to be not only trivial, but absurd. It has no logical coherence. It seems to be the product of a mind without faith in the possibility that men can be honest.

ARGUMENT UPON ASSIGNMENTS III AND IV.

In the master's petition he stated the time employed, the record examined, the amount involved, the nature and difficulty of the services rendered. He characterizes the work done and states that it was, without qualification, the most difficult in a long experience and gives his reasons therefor. (Record 127-128.) (See also the Master's Report, Record, pages 21-22). He states that five thousand dollars (\$5000) would be a reasonable fee, and that four thousand two hundred dollars (\$4200) would be the minimum that should be allowed.

Assignment or exception III, Record 382, asserts error in the court's order fixing one thousand eight hundred dollars (\$1800) as the amount and that the services were of no greater value than seven hundred fifty dollars (\$750).

Assignment IV, Record 382, seems to be a duplicate in substance of assignment II to the effect that the services were worth nothing because of the master's disqualification.

These assignments as to value of the services seem to be abandoned since there is no discussion thereof in the brief. While I believe that this court does not consider assignments of error not noticed in the briefs, the following brief argument is presented on the assumption that I may be mistaken.

There is absolutely no point in the appeal. The fixing of a master's compensation and the determination of the party liable is a matter within the sound discretion of the trial court and this court will interfere only in the event of what amounts to abuse of that discretion. No such abuse is here shown or can be shown.

It is evidenced to the court that in his petition for a larger allowance, the special master was far out of line with the views of Judge Van Fleet, a disproportion, I may say, unique in my experience, and one that was at once embarrassing and rather humiliating. The appellee recognizes that he must have overestimated the value of his services, and yet feels that had the full range of those services been understood, the award would have been greater. Yet, if the master were here before this court as a cross-appellant alleging that the compensation awarded were too low, how could this court say that the District Court had abused its

discretion? As the master's appeal would have been unsuccessful, so must the present appeal be unsuccessful.

Citation of authority is perhaps unnecessary. The whole matter of master's fees and the principles which should govern their determination were considered by the Supreme Court of the United States in *Newton v. Consolidated Gas Co.*, 259 U. S. 101. The lower court in a rate-fixing controversy involving difficult questions and very great values had awarded the special master one hundred eighteen thousand dollars for about one year's services. While neither court fixed the compensation on the basis of a per diem, the extent of the allowance is shown by the fact that it figured out on an average over all the consolidated cases, about \$418 per day. The Supreme Court held, in effect, that while the salaries of judges might be held in mind, they were of remote application because of the temporary nature of the master's employment, and that the master is to be paid as a lawyer is paid. It was held that that matter was one for the sound discretion of the trial court. They held, however, that under all the facts, the award was excessive, and reduced it to approximately fifty thousand dollars, an average of about \$175 per day.

It is submitted that the exceptions as to the amount of the master's compensation are without the slightest foundation.

DAMAGES SHOULD BE AWARDED FOR A FRIVOLOUS APPEAL.

If Rule 30, Subd. 2 and 3, of the rules of this court, is ever to be applied, this case would seem to present an appropriate case for its application. There is no substance whatsoever in the assignments of error, and it must be patent that the appeal could only have been sued out for delay. It seems plain that the purpose of the appellant must be to delay payment of the master's compensation in the hope that this court may overturn the decree in the main appeal. Presumably appellant considers that in that case the payment of master's fees will be charged against the trustee as the losing party. Even in case of the reversal or modification of the decree, it would not follow that this court would change the incidence of the costs of the accounting. A court of equity does not usually charge its master's fees upon a party who cannot pay them.

The appeal has resulted in hardship to the master that will not be compensated by the 7% interest allowed upon the judgment in his favor. The master is not a litigant, and, as the court's officer, he should be paid promptly. The fact that process to compel payment of his fees is the summary process of attachment for contempt indicates of itself that such fees should be paid at once.

In this case the master's services began in 1917 (Record, page 19) and continued until the filing of his report in December, 1921 (Record, page 80).

His compensation was not fixed until September, 1922 (Record, page 204). The further period of over a year has elapsed by reason of this appeal, and it is only during the last named period that he will have even the partial compensation of interest. During all this period, no payment for his services has been received. In addition, the master, a practicing lawyer, has been compelled to present this appeal in his own behalf, a professional service which for another client would be compensated by an attorney's fee.

It is submitted that the appeal should be dismissed, with interest and damages of ten per cent. (10%) in addition to the interest, and costs.

Dated, San Francisco,
November 8, 1923.

Respectfully submitted,
H. M. WRIGHT,
Appellee in Person.

No. 4091

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

5

J. J. RAUER,

vs.

Appellant,

GEORGE H. HATFIELD, as trustee in bankruptcy of the estate of A. E. BUCKMAN, bankrupt, and H. M. WRIGHT et al.,

and

Appellees,

J. J. RAUER,

vs.

Appellant,

GEORGE H. HATFIELD et al.,

Appellees.

APPELLANT'S REPLY BRIEF.

H. M. ANTHONY,

J. B. ZIMDARS,

WM. GRANT,

Attorneys for Appellant.

FILED

NOV 28 1923

F. O. MONGKTON

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APPELLANT'S REPLY BRIEF.

The first part of appellees' brief is directed to the question of the right of appellant Rauer to have reviewed the decree of September 11, 1916, and to that question this argument will be addressed, before taking up the merits of the appeal.

In our opening brief, pages 17 et seq., we urged that the decree of September 11, 1916, should not be construed as determining that Rauer was a con-

spirator with Buckman in the formation of the corporation, Sunset Construction Company, for the purpose of defrauding the creditors of Buckman, and we think our reasons there advanced are quite convincing; but assuming we are wrong in our contention, then we urge that a decree so determining is not supported either by the pleadings or by the evidence, and should be set aside on appeal.

The Master's report which became in effect the final judgment from which the appeal has been taken, proceeds upon that which we say is the erroneous construction of the decree. In the report the Master says:

“Rauer will suffer loss by reason of the fact that he believed himself entitled to deal with the Company after Buckman's bankruptcy as a separate entity, not affected by his bankruptcy. These, however, are matters that concern the correctness of the interlocutory decree only, and so far as Rauer is concerned, I shall hereafter embody a recommendation that he be allowed to prove his claim herein.” (Transcript, page 63.)

Further in the report the Master says:

“It must be remembered that Rauer dealt with the Sunset Construction Company after Buckman's bankruptcy, and undoubtedly on the theory that he was safe in so doing since the Company had not been declared a bankrupt.” (Transcript, page 71.)

Therefore the question as to whether the decree of September 16th was final and appealable is a matter of consequence, and as counsel for appellee

has devoted a large portion of his brief to this question, we may be pardoned for treating the matter at some length.

THE APPEAL OF SEPTEMBER 11, 1916, IS NOT A FINAL DECREE AND CAN BE REVIEWED ONLY ON THE APPEAL FROM THE FINAL JUDGMENT, AND THERE IS NO QUESTION THAT THE APPEAL FROM THE FINAL JUDGMENT WAS TAKEN WITHIN TIME AND IS PROPERLY BEFORE THIS COURT.

Section 128 of the Judicial Code (see Federal Stat. Ann., 2nd Edition, Volume 5, page 607) provides:

“Circuit Courts of Appeal shall exercise voluntary jurisdiction to review by appeal or writ of error *final* decisions in the district courts. * * *

If the decree of September 11, 1916, is not final, an appeal therefrom would not lie, and it can be reviewed only through an appeal from a final judgment in the courts.

The question as to what constitutes a final decree has been the subject of much discussion. In the notes to the above citation, the subject is treated at great length, and many cases are cited. We refer specially to pages 611, 612 and 613. The rule established by the decision is this:

“Where a decree is made fixing the liability and rights of the parties, and which decree refers the case to a Master for a judicial purpose, such for instance as a statement of account upon which a further decree is to be entered, the appeal is not final.”

In the instant case, not only does the decree order an accounting, but in terms it directs the Master to report his accounting to the court that further action may be taken thereon. (Transcript, page 16); and in the complaint itself, the prayer asks:

“That an accounting be had from said defendants of the assets and profits of said corporation since the month of January, 1914.” (Transcript, page 7.)

It is true that if a decree is entered directing something to be done, which is simply in execution of the decree, the decree may be regarded as final; but where the act to be done is judicial in its character, and is not designed to be final but is subject to confirmation by the court directing the act to be done, the decree is but interlocutory and is not reviewable by direct appeal.

In the case of

Cal. National Bank v. Stateler, 171 U. S.,
at page 447,

it is said, quoting from the opinion:

“Motion is made to dismiss this writ of error upon the ground that no Federal question is involved in this case.

Without, however, expressing an opinion upon this,—we think the case will have to be dismissed on the ground that the order appealed from is not a final order within the decisions of this court. * * *

The settled rule is that if a Superior Court makes a decree fixing the liability and rights of the parties, and refers the case to a master or subordinate court for a judicial purpose, such, for instance, as a statement of account upon

which a further decree is to be entered, the decree is not final. *Craighead v. Wilson*, 18 How. 199 (15:332); *Beebe v. Russell*, 19 How. 283 (15:668); *Keystone Manganese & Iron Co. v. Martin*, 132 U. S. 91 (33:275); *Lodge v. Twell*, 135 U. S. 232 (34:153); *McGourkey v. Toledo & Ohio C. Railway Co.*, 146 U. S. 536 (36:1079); *Union Mutual Life Ins. Co. v. Kirchoff*, 160 U. S. 374 (4):461); *Hollander v. Fechheimer*, 162 U. S. 326 (40:985).

The writ of error is therefore dismissed."

See

Simkins Fed. Suit in Equity, page 636;
Keystone Iron Co. v. Martin, 132 U. S. p.
 91, and *Rose's Annotations thereto*;
 s. c. 5th Ann. Case 177.

In the notes to 5th Ann. Case 177, it is said while there is some diversity among the courts of several states as to what is an interlocutory decree, the United States Courts hold that where an accounting is to follow as a judicial matter, the judgment is not final.

In the very late case of

Clement v. Duncan, 39 Cal. App. Dec.,
 page 13,

it is said:

"An interlocutory decree in an action for a dissolution of a partnership and for an accounting based upon findings which determine none of the questions at issue except the fact of partnership and the existence of mutual and undetermined claims and demands and upon a conclusion of law which declares no more than that an accounting is necessary, is not a

full and final determination of all the issues raised by the pleadings, and a dismissal of an appeal from such a decree does not preclude its review on appeal from the final judgment."

See

Rossi v. Caire, 64 Cal. Dec. 237.

In the annotations to Section 128 of the Judicial Code found in the 5th Federal Stat. Ann., page 612, under the subdivision 4, "References and Accounting", there will be found a quite full discussion of this question as to what is a final judgment, and a lengthy list of cases from U. S. Supreme Court is cited. We ask the court to read that note, which to our mind is exhaustive of this question.

The motion of appellee to dismiss the appeal is based on two grounds: First, that no appeal was taken within six months from the decree of September 11, 1916, and secondly, that some of the defendants named in the original bill were not served with the appeal process.

There is no question, of course, that an appeal was properly taken from the final decree within due time.

In answer to the motion to dismiss because some of the defendants were not served with due process, attention is called to the facts embodied in the affidavit on file herein that the defendants not served with process had died long prior to the entry of the judgment; that no representatives of their estates have been substituted, and further, the judgment of

the lower court was in favor of the defendants who were deceased, and no appeal was taken therefrom by any of the parties to this present appeal. The appellant Rauer simply appeals from that part of the judgment which decrees he must pay a certain sum of money to the trustee in bankruptcy. He does not appeal from that part of the judgment dismissing the defendants, who have died, from the action; and, as before stated, the trustee in bankruptcy has taken no appeal at all from the judgment. Furthermore, it may be suggested that a judgment taken against a dead man, without representation of his estate, is void; and if the appeal were taken after a valid judgment, and a respondent to the appeal had died after the appeal was taken, the dismissal of the appeal would not be the proper practice, but under the Compiled Statutes of 1916, page 1308, notice would have to be given to substitute a representative of the estate.

REPLY ARGUMENTS ADDRESSED TO MERITS OF THE CASE.

Much of appellee's brief, and much of the oral argument was directed to items and amounts appearing in the record. The report of the Master finds that on February 19, 1915, the date that Buckman voluntarily filed his petition in bankruptcy, the Sunset Construction Company was indebted to Rauer in the sum of \$18,746.22 (Trans. p. 77); and later is shown by the record that the Sunset Construction Company became indebted to Rauer

in the additional sum of \$18,561.54, thus making a total of \$37,307.76. No appeal was taken by the trustee from this report, and therefore so far as the trustee is concerned, the figures found by the Master must be accepted as correct. Certainly Rauer was not putting his good money into the Sunset Construction Company to keep it afloat and going to that extent to defraud Buckman's creditors. It will be remembered that Rauer is the only creditor of the Sunset Construction Company and that as far as the record shows the only creditors of Buckman were persons who had claims against him prior to the formation of either of the two corporations, Sunset Construction Company, excepting only the creditor the woman who obtained a judgment against him for \$15,000.00 for breach of promise of marriage, and which judgment led to Buckman filing his voluntary petition in bankruptcy.

The record shows that Buckman had no assets of any kind whatsoever at the time he filed his petition in bankruptcy, and as recited by the Master in his petition for compensation, unless judgment was obtained against Rauer in the instant case, there would be no funds whatever belonging to the bankrupt estate.

The accounts of the Sunset Construction Company were most carefully examined. Nowhere is there any suggestion that Rauer had any dealings with the Sunset Construction Company, excepting that of a man lending money thereto, and these transactions extended over a period of many years.

Complaint is made by the appellees that Rauer drove a hard bargain with the Sunset Construction Company, and the terms upon which he lent money. While the interest rate charged by Rauer was high, yet as found by the Master, the enterprise in which the Sunset Construction Company was engaged, and without financial responsibility called for a high rate of interest.

If it were a fact that Rauer did drive a hard bargain with the Sunset Construction Company in his financial dealings with them, such conduct is quite out of line with the thought that Rauer and Buckman were acting in concert for the advancement of especially Buckman's interest.

Fraud is never presumed, and no transaction is shown by this record indicative in any wise of a purpose on the part of Rauer to defraud the creditors of Buckman. There is no evidence to show that Rauer ever knew that Buckman had a creditor, much less that Rauer knew that the Sunset Construction Company was a cloak whereby Buckman could defeat his creditors.

Comment is made by counsel that Rauer referred to Buckman as the "whole shooting match". Buckman was the general manager of the corporation. He had full power from the board of directors to enter into the contracts with persons doing business with the corporation, and unquestionably he was the active man representing the corporation, and in the language of the street he was "the whole

shooting match''. That does not mean that Rauer did not view the Sunset Construction Company as a corporation, simply because Buckman was the "whole shooting match" in connection with the carrying on of its affairs. The Sunset Construction Company functioned completely as a corporation. All the accounts and transactions were with the Sunset Construction Company; not only the transactions that Rauer had with the Sunset Construction Company, but all transactions of all parties shown by the books, were with the Sunset Construction Company.

If it were a fact that Buckman formed this corporation for the purpose of defeating his creditors, this would not affect Rauer's right to do business with the corporation, provided he was not a party to a conspiracy in the formation of the corporation, or engaged in the scheme to defraud Buckman's creditors. The complaint in this action does not even suggest that Rauer had anything to do with the affairs of the corporation, and his connection with Buckman, as shown by the complaint is that of a person who acquired the shares of stock some three years after the formation of the corporation.

The Master who heard the testimony in this case certainly did not think that Rauer was a party to any fraud. This is conclusively established by the fact that the Master states that in his opinion a hardship is worked upon Rauer by the construction that he, the Master, places upon the decree, and that Rauer believed he could safely transact

business with the Sunset Construction Company not affected by the fact that Buckman personally had filed a petition in bankruptcy.

Certainly it will not be suggested that if the Master believed Rauer to have been guilty of entering into a conspiracy with Buckman to defraud Buckman's creditors, that the Master would go out of his way to say that he would embody a recommendation that Rauer be allowed to prove his claim against the bankrupt estate. Not only is there no evidence to warrant a conclusion that Rauer was a party to any conspiracy, but the contrary is to our mind most conclusively established by the facts that Rauer is the only creditor of the Sunset Construction Company, and that to the amount of some \$37,307.76, and that the Master reports that his construction of the decree works such a hardship upon Rauer that he will endeavor to get relief for Rauer by joining in a request that he be allowed to prove the amount of his claim against the bankrupt's estate. This measure we can hardly assume the Master would have suggested if Rauer's losses had been the result of a fraudulent conspiracy in which Rauer actively participated for the purpose of defrauding others.

The final decree in this case is in favor of Buckman for his costs. (See Transcript page 206.) How could this be reconciled with the theory that even Buckman was a party to any fraudulent conspiracy? It will be remembered that the petition in bankruptcy was a voluntary petition, and was

brought about by the procurement of the judgment against Buckman by a woman for breach of promise of marriage.

The corporations were formed in the years 1910 and 1911; the judgment for breach of promise of marriage was obtained in 1914.

On page 32 and 33, et seq. of Appellant's Opening Brief, it is urged that the shares of stock owned by Buckman in the Sunset Construction Company were pledged to Rauer. Concerning this transaction or pledge, and the validity thereof, no question whatever can be made, excepting only the general objection that the whole corporation scheme was a measure adopted by Buckman and Rauer to defraud Buckman's creditors. Buckman, however, did pledge his shares of stock to Rauer for money advanced by Rauer, to secure the payment of a \$20,000.00 note. (Transcript p. 233.) Rauer testified that at the pledgee sale he sold these shares, and it appears that Meadows subsequently became the owner thereof, but whether the pledgee sale was effective or not, the pledge undoubtedly existed, and the rights of the trustee as successor in interest of the pledgor, is subject to the rights of either Rauer as pledgee, or Meadows, as owner, and neither of these rights is recognized in the accounting.

The appellee on pages 33 and 34 of his brief, urges that Rauer is not in a position to make this point because he testified that he sold the property

at the pledgee sale, and it is also claimed by the appellee that Meadows has not appealed from the judgment declaring that the trustee is the owner of these shares, and therefore the judgment concludes the question that the trustee is the owner of the shares.

The interlocutory order was not a final order, and Meadows could not appeal therefrom. It appears from the affidavit filed at the time of the argument that Meadows died on the 9th day of August, 1920, in the City and County of San Francisco, and there has been no administration upon his estate, and no one has been substituted in this litigation to represent the Meadows interest. The final judgment in this case was entered on November 6, 1922. Therefore the judgment is void as against the Meadows interest. Rauer can defend against the claim of the trustees by showing a title outstanding in a third person. The plaintiff must recover upon the strength of his own title. The record in this case establishes beyond question that these shares of stock are either held by Rauer as pledgee, or the shares of stock belong to the estate of Meadows, and in no event is the trustee as the successor of the pledgor entitled to any accounting unless the rights of Rauer as pledgee, or the rights of the estate of Meadows, as an owner, are given effect.

Counsel for appellees in his oral argument stated that the appellant had not conformed to the rules, in that in his brief references to the Transcript

were largely omitted. This is not the fact, as the brief is full of references to the Transcript, and counsel for appellant has been in every way fair to appellee and his counsel.

This, however, is not the case with counsel for appellee. The brief they filed is in our estimation unfair in many of the statements of the facts. They have quoted and addressed themselves to single sentences and entirely omitted the context which explains those sentences in an entirely different way.

Appellant here reiterates the statements made several times in his brief that there is not a bit of evidence anywhere in the record that shows any fraud on the part of J. J. Rauer. Counsel say (page 4) that the record fairly teems with testimony on the subject of Buckman's ownership of the corporation. We say the record is full of evidence that the corporation was a functioning corporation, having meetings of its directors, passing resolutions, etc. (Transcript pp. 227 (bottom) 299, 300, 305, 306) and the Master says undoubtedly it acted as a corporation (Transcript p. 304), and that Rauer dealt with it as such (Transcript p. 63). That it adopted a resolution giving A. E. Buckman authority to do business for it, and that Buckman showed this authority to J. J. Rauer, (Transcript p. 303) and that upon that Mr. Rauer founded his dealings with the corporation through Buckman; and further that Rauer had absolutely nothing to do with the internal affairs of the corporation (Tran-

script pages 299-300); that Rauer knew nothing of its internal affairs and never heard what salary Buckman was getting till he heard it in the Bankruptcy Court. (Transcript p. 238.)

Suppose for the sake of argument, the Sunset Construction Company was Buckman, nevertheless since Buckman represented it as the Sunset Construction Company, and Rauer did business with it upon that understanding, Buckman would be foreclosed from saying otherwise, and Buckman's trustee stands in no different position than Buckman. The Master makes the statement (Transcript p. 304) that "*undoubtedly it* (the Sunset Construction Co.) acted as a corporation", see also p. 63.

Counsel say Buckman drew money from the Sunset Construction Company as he desired it, including personal living expenses (page 5 of brief), citing Transcript folios 210-211. We ask the court to read all of these pages of the transcript, and also page 305 of the transcript. It will be seen therefrom that Buckman apparently did not draw his salary in a lump sum every month but drew upon it as he needed it for his personal expenses. There is no evidence that Rauer had any knowledge of their affairs, much less that Rauer profited or schemed to bring it about. This is an every day occurrence, and it does not in any way establish that Buckman was the owner of the company, much less that Rauer knew it, and it does not prejudice Rauer's position in dealing with it as such. Buckman testi-

fies that none of the moneys advanced by Rauer were advanced to him personally. (Transcript p. 230.)

Counsel say, (page 7 of brief) that Rauer took duplicate notes and securities; that he took one note from the corporation and took another note from Buckman covering the same indebtedness, and quote Rauer as saying when asked why he took this note of Buckman's, that there was really no reason for it as Buckman was really the whole shooting-match. As a matter of fact, when Rauer so testified some years after the occurrence the legal reason for his taking the note of Buckman was not uppermost in his mind, and that reason was this: Having advanced some \$20,000 to the company, the assets of which never were very strong, he wanted to get all the security he could, and demanded a pledge of the stock from Buckman. In order to make this pledge a proper one, he took Buckman's individual note and Buckman pledged his individual stock as security for the payment of his individual note. That this amount represented the same indebtedness appears from both the Sunset Construction Company's books and from Rauer's books; and always appeared therein, could always have been ascertained to have been so by anybody who desired to inquire. There was no concealment of any assets nor was there any concealment of any facts, and where inquiry was made concerning these matters these facts were unhesitatingly stated both by the Sunset Construction Company and by Rauer.

Counsel state in their arguments that it was not until the examination before the Referee that these matters developed, that Rauer did not testify to them in the hearing in the District Court. We reply, that the hearing in the District Court was confined to one subject, and that was: Who was the owner of the stock that was pledged to Rauer? And testimony upon these other matters had no place in that hearing .

Rauer collected interest upon only one indebtedness, and not upon any duplicate or triplicate indebtednesses. He collected it at $1\frac{1}{2}\%$ a month for a while, and then at 2% a month, but most of this interest he did not collect, but today holds the checks of the Sunset Construction Company representing this unpaid interest.

Rauer's accounts and the admitted facts in evidence show that he advanced to the Sunset Construction Company during the time that he was loaning it money, altogether some \$105,000 before March, 1915, and thereafter some \$20,000 more. Outside of the \$20,000 first advanced to the Sunset Construction Company, most of this was borrowed by Rauer for the construction Company from a money lender named Judah Boas, who charged $1\frac{1}{2}\%$ per month for the use of that money. Rauer stood good for this money and received only $\frac{1}{2}\%$ as his share for the risk of standing good for all this principal and all this

interest to Judah Boas (see Rauer's and Buckman's testimony, Transcript pages 301-2-5).

Fillmore Buckman, the secretary and bookkeeper of the Sunset Construction Company testifies that his accounts and Rauer's accounts, always tallied approximately. (Transcript page 299.)

Counsel make a great ado about what they claim Rauer's concealment of payments to him, saying that some \$23,000 were paid to him of which his books show no account. (Brief page 12.) The reason why these payments did not show in that account was this, and it is fully explained in the testimony: that shortly after the \$20,000 note was taken by Rauer, he ceased keeping books of the amounts paid by him, and the amounts loaned by him to the Sunset Construction Company, and the amounts received by him from the Sunset Construction Company, but simply took checks. That is when he advanced money for them they would give him their check, and when he would be paid by them, or on any accounts assigned to him, he would return to the Sunset Construction Company checks that he held in the amount of such money received, and that because he happened to have no regular bookkeeper at that time that is the only account he kept. This matter was most fully gone into on the trial, and counsel for appellee are not putting forth their contention in good faith.

In the record before this court the testimony is very much abbreviated, but there is sufficient to show that these are the facts and references to

transcript pages 177, 295, 298 and 299 will show this. This is also further substantiated by the list of unpaid checks still held by Rauer, on pages 281-282.

The claim of counsel (page 8 of brief) that the notes held by Rauer in December, 1913, showed an indebtedness of \$70,000.00, instead of an actual indebtedness of \$20,000.00 and that this is evidence of fraud is entirely unsubstantiated by the testimony, for there was never any contention by anybody that the indebtedness was any more than it actually was, and Fillmore Buckman testifies that the Sunset Company's books never showed any greater indebtedness than the actual indebtedness, and that Rauer's accounts always tallied with theirs. (See Transcript page 299.) The duplicate notes were taken simply, as heretofore shown, because different kinds of securities were taken for the balance; and none of these securities were anywhere near sufficient to secure the claim of Rauer. What possible reason could there be for Rauer claiming any greater amount of indebtedness than there was owing to him, when there were no assets anywhere near the amount that was actually coming to him.

Every one of these instances which counsel cite as glaring evidence of Rauer's attempt to deceive is clearly explained by the testimony and shows that Rauer was perfectly innocent of any fraud throughout, and this is conclusively found by the Master himself when he says that Rauer dealt with

the company in the honest belief that he had a right to deal with it. (p. 63 Transcript and 37 and 38.) If it had been designed either by Buckman, or by Rauer to conceal the actual character and extent of the transactions between them, certainly they would have adopted a careful and apparently orderly plan, whereas their dealings showed that they were carried on without any co-ordination or attempt at conformity.

Addressing ourselves to the item of the collection from the Federal Construction Company, counsel say, (page 36 of brief), that the Master gives two reasons for allowing one-half of this collection as a charge against Rauer. It is true in his tentative report he did suggest another reason, but this reason was not adopted in the final report that he filed, and in the final report, pages 73-74 of Transcript, he only gives one reason for his allowance, and that reason we attack.

As to the other reason that this was a contract made before bankruptcy, and although nothing had been done on the contract up to the bankruptcy, and it was wholly performed after bankruptcy by Buckman and by Rauer (Transcript p. 352), without any interference by the trustee, and not until a year afterwards was any claim made by the trustee that this was an asset of the bankrupt. It seems to us that the Master was perfectly correct in abandoning such a contention.

CHATTEL MORTGAGE.

Counsel (page 38 of brief) say that our statement that Rauer had possession of the equipment at all times after bankruptcy is not substantiated by the evidence. They say that in fact he did not get possession until immediately before the decree of the Superior Court was rendered. This is not true. The fact is the Master has charged Rauer with rental of this equipment for periods long antedating that time, and the direct testimony is that Rauer took charge of the equipment on March 20, 1915, which was one month after the bankruptcy. (Transcript page 364.)

Neither was this possession of Rauer colorable, as counsel seek to make it appear by referring to an agreement between Buckman and Rauer with reference to a sale for \$2500.00. This agreement and sale to Buckman was only of three sand machines, and there was no agreement with reference to any other part of the equipment. (See Transcript pages 364-370.)

Counsel state the contract with the Federal Construction Company was completed January, 1916, and that this was long before the time when Rauer took possession of the equipment under the chattel mortgage. This is another one of counsel's mis-statements of facts.

Counsel say that Rauer did not give Buckman credit upon the mortgage indebtedness, but upon the general running account (p. 39 of brief). The

general running account included the mortgage indebtedness, and if it was not, that can be done at any time since Rauer has a right to do this.

Counsel say on page 39 of brief that the Master treats the San Bruno contract as if it was partly made to cover Buckman's services, but say that the testimony shows that the services rendered by Buckman were of little or no service, and quote some testimony of S. B. Doyle and J. A. Dowling, citing pages 355 and 359.

We ask the court to read the remainder of the quotation from page 359, represented in counsel's quotation by stars. This shows that even according to the testimony of J. A. Dowling, who tried to keep from paying the Sunset Construction Company and Rauer what was coming under the contract, testifies that Buckman was on the job every morning.

It also appears from the further testimony that Buckman was very instrumental in getting this contract and the money for it. (Transcript page 362.)

With reference to the expense of repairing the equipment, counsel is just as unfair as they are all through the rest of their brief. They cite, page 41, the testimony of Rauer to this effect, "I could not estimate what I paid out for repairing the sand machines", as a statement indicating that Rauer did not pay it out, or knew nothing about what he had actually paid out. We submit that the proper

interpretation of that statement is that the amount was so large it was hard for him to estimate; but Rauer is more specific in his testimony, and states amounts actually paid by him for that. (Transcript pages 365, 369, 370.) It is true the Master excluded Rauer's account showing payments of \$2025.96 for these expenses, which account sets forth fully the items of each expenditure, upon the ground that Rauer did not accompany the account by receipted bills from the parties to whom he had actually paid the money. (See pages 185-190 Transcript.)

It will be noted that the bill of the Pacific Gas & Electric Company which counsel comments upon on pages 40-41 is not among those, and we ask the court to read the testimony as to this last bill (Transcript page 369), and it will clearly show counsel's comment is unwarranted.

On page 370 of the Transcript, Rauer testifies to the amounts paid out by him for the rent of the sand machine patent. Counsel say there is no such testimony.

Page 44, counsel take up the \$300.00 Academy of Science collection and quote an isolated extract of testimony. Page 309 of the Transcript shows how misleading their quotation is. On the latter page it appears that the cost of finishing up this work (and which was after Buckman's bankruptcy) was \$500.00, and for that was received only \$300.00.

Rauer paid for this work, and all he got was the \$300.00.

Page 45, counsel say that the correction (which we call attention to in our brief) of "January" to "June", is not correct. The Master in his report, page 75 of Transcript, agrees with us and quotes this time as being June.

Page 45 of the brief, counsel comment on the name of "Reeder & Foster", as follows: "The Master says that Reeder & Foster is probably another name for "Foster, Vogt Co.", and counsel add, "used by Rauer to confuse his account." Such a comment is unwarranted and vicious.

Nowhere in Rauer's testimony is there any attempt to confuse any account.

It will also be noted that counsel confess (their brief p. 45) that this contract was assigned to Rauer before bankruptcy, and therefore any collections which might have been made by him should not, even under counsel's and the Master's theory, be accounted for to the trustee.

The consideration of these various items, of course, is to our mind entirely academic, for the main underlying and controlling principles entitle Rauer to offset any collections which he might have made in his dealings with the Sunset Construction Company against any moneys that were owing to him, and even the Master has found that the Sunset Construction Company owed Rauer \$18,746.22 on February 19, 1915, the date of Buckman's bank-

ruptcy (Transcript p. 77); and the testimony of Rauer and others, is to the effect that in the dealings subsequent to that date, the Sunset Construction Company became indebted to Rauer in an additional \$18,000. (Transcript p. 368.) It seems to us that every justice and equity is with Rauer.

The record shows that Rauer as the mortgagee of all the machinery had taken possession under the terms of his mortgage and that under a decree of foreclosure in an action in which the Sunset Construction Company, the mortgagor, was defendant the property was sold and he had purchased the property himself. After this decree of foreclosure the trustee in bankruptcy took possession of this machinery proceeding upon the idea that the Sunset Construction Company was not the owner of the property, and that the trustee in bankruptcy should have been made a party to the foreclosure suit. Rauer, thereupon filed a petition in the bankruptcy court, asking the property be sold through the bankruptcy court, and that the proceeds of this sale be impounded to abide the determination as to who was entitled to the money. Rauer desired to obtain title, and the money derived from the sale he had a right to have applied on his mortgage, whether Buckman was the mortgagor or whether the Sunset Construction Company was the mortgagor,—because as mortgagee he was entitled to have the mortgaged property sold and the proceeds applied; and the property was sold as the trustee in bankruptcy wanted it sold, and the proceeds of the sale are im-

pounded awaiting the determination of this litigation. (See Item 3 of the Final Decree, Transcript page 206.) Surely this was a more sensible way of proceeding than to have litigation to determine whether the sale under the judgment of foreclosure against the Sunset Construction Company alone passed title. We do not see how it can be construed as anything excepting a disposition to pursue an unobjectionable course to get results.

The property was sold for \$3701.60, and this is the property for the use of which the Master charges Rauer with \$9006.99 and refused to allow the amount to be credited on the mortgage, but decrees that Rauer must pay the full amount to the trustees, although the amount for which the property was mortgaged will not be discharged by applying the purchase price and the rental value against the indebtedness.

On page 60 of appellee's brief it seems to be conceded that if the mortgagee has lawful possession of the mortgage he may apply the rents against the mortgage debt, but it is alleged that Rauer's possession of the mortgaged property was unlawful, and therefore he should not be allowed to apply the rental values against the mortgage indebtedness. The Master finds (Transcript page 44) :

"The mortgage was given in June, 1914, to secure a note for \$5000.00 and future advances.
* * * It contained a clause allowing the mortgagee to take possession after default. The notes were payable on demand, and since there was a continuing balance of indebtedness, it is

probable a default occurred at an early date.
 * * * Since the mortgage provided the mortgagee might take possession, Rauer was entitled to do so at any time after default." (Page 46, Transcript.)

Even if it be assumed that the Sunset Construction Company was simply Buckman in another form, the trustee in bankruptcy would have no greater rights than Buckman, and the mortgagee would be entitled to possession. Rauer's possession as a mortgagee therefor was not unlawful.

In Jones on Mortgages, Sec. 715, it is said:

"It is not essential to the status of a mortgagee in possession that possession should have been taken under the mortgage, nor with the consent of the mortgagor. It is enough that the possession be peaceable and legally acquired."
 (Citing cases.)

There is no question that Rauer's possession of the machinery was peaceably and legally acquired. It will be assumed that the possession of a mortgagee is lawful, and further it may be urged that since Rauer by the terms of the mortgage was entitled to possession, if any further consent were required, equity would consider that is done which ought to be done.

This subject is most fully covered in pages 58 et seq. of the opening brief for appellant.

In conclusion we make the following suggestions:

First: The issues presented by the pleadings are directed to the question of fraud in the transfer by

Buckman to Rauer of shares of stock in the Sunset Construction Company, and no issue is raised by the pleadings as to whether Rauer was a party conspiring with Buckman in the formation of the Sunset Construction Company to defraud Buckman's creditors.

Second: That the Master erred in not allowing Rauer credit in his account for the items specially pointed out in appellant's briefs, and particularly in not allowing Rauer to charge against his mortgage indebtedness the value of the use of the mortgaged property.

Third: The judgment is based on the report of the Referee whose demand for \$5000.00 compensation for services could only be paid out of a fund created by a judgment in favor of the trustee in bankruptcy against the defendant Rauer.

And, lastly, Rauer can be held liable only upon the theory that he was a party to a fraud with Buckman in the creation of the Sunset Construction Company, a corporation, or in the carrying on of business of said corporation for the purpose of defrauding Buckman's creditors.

No reason can be suggested why Rauer should engage in such a conspiracy. No evidence is offered showing or tending to show that Rauer even had an acquaintance with Buckman at the time of the formation of the Sunset Construction Company, much less that he knew the Sunset Construction Company was formed for the alleged purpose of defrauding

Buckman's creditors, and the Master finds that Rauer in good faith believed he had the right to transact business with the Sunset Construction Company, and the judgment of the court in favor of Buckman, dismissing him from the action and allowing his costs of suit is absolutely irreconcilable with the idea that Rauer was a party to any conspiracy with Buckman to defraud Buckman's creditors.

Fraud is never presumed. The Master reports a judgment against Rauer—feels constrained so to do because of his interpretation of the so-called interlocutory decree, and this interlocutory decree, as we have shown, has no basis in the pleadings for a judgment that Rauer was a party with Buckman in the scheme of defrauding Buckman's creditors; and further the evidence before the court, and upon which the decree was based lends not the slightest support to any judgment decreeing that Rauer was a party to a conspiracy in the formation of the Sunset Construction Company to defraud Buckman's creditors.

The record shows there is owing to Rauer because of his dealings with the Sunset Construction Company an unpaid balance of \$37,307.76. If to that sum be added the amount of the present judgment, there will be a sum of over \$50,000.00 of a loss suffered by Rauer.

Let it be borne in mind that basically the plaintiff as trustee for the creditors is entitled to recover

only upon the theory that Rauer through a consummated fraudulent conspiracy has deprived such creditors of a sum of money represented by the amount of the judgment in this case. How can a judgment upon such a theory be sustained when the record shows that Rauer instead of wrongly and fraudulently depleting any assets to which Buckman could in any way lay claim, has added to those assets in the sum of \$37,307.76?

To our mind the judgment in this case is very wrong, and we submit it should be set aside.

Dated, San Francisco,

November 26, 1923.

H. M. ANTHONY,

J. B. ZIMDARS,

WM. GRANT,

Attorneys for Appellant.

No. 4091

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. J. RAUER,

VS.

Appellant,

GEORGE H. HATFIELD, as trustee in bankruptcy of the estate of A. E. BUCKMAN, bankrupt, and H. M. WRIGHT et al.,

and

Appellees,

J. J. RAUER,

VS.

Appellant,

GEORGE H. HATFIELD et al.,

Appellees.

CRITICISM OF REPLY BRIEF OF APPELLANT RAUER.

CHAS. S. WHEELER, JR.,

EDWIN H. WILLIAMS,

Attorneys for Appellees.

FILED

1903

U. S. DISTRICT COURT

No. 4091

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. J. RAUER,

Appellant,

VS.

GEORGE H. HATFIELD, as trustee in bankruptcy of the estate of A. E. BUCKMAN, bankrupt, and H. M. WRIGHT et al.,

Appellees,

and

J. J. RAUER,

Appellant,

VS.

GEORGE H. HATFIELD et al.,

Appellees.

CRITICISM OF REPLY BRIEF OF APPELLANT RAUER.

(1) The reply brief of appellant Rauer opens with certain quotations from the report of the Master which are there stated to be "in effect the final judgment from which the appeal has been taken". These quotations are used to support the theory that Rauer dealt with the Sunset Construction Company in good faith believing it to be a

bona fide corporation. That question was not before the Master for determination as it had already been tried and decided by Judge Van Fleet at the trial of the case in chief. This fact is recognized by the Master and stated by him in terms to be the rule governing him in the hearing of evidence upon Rauer's account. (Trans. 61.) But the Master found many things in Rauer's account which go to show that the account was false and fraudulent and unworthy of credit, and that Rauer was not acting in good faith in rendering the same. We quote from the Master's report:

"Neither the Sunset Construction Company nor the defendant Rauer kept adequate books of account. The witness Rauer did not confine himself to clear answers to questions but volunteered much that was not pertinent thus destroying the orderly presentation of the facts. The statements filed are confused, misarranged and not at all complete." (Trans. 22.)

"Furthermore both of the statements of account are vitiated by extensive omissions." (Trans. 24.)

"Furthermore the account, though professing on its face to be supported by numbered vouchers, was not so supported. The testimony in regard to it was confused, uncertain and lacking as regards many items and there was much omitted that should have been included." (Trans. 64.)

"The funds have been so mixed by him (Rauer) and there are so many items of doubt, and so much in the evidence to show that more of the prior assets of the Company have been received by Rauer than can be here traced." etc. (Trans. 39.)

Moreover the Master shows that Rauer's claim against the Sunset Construction Company as originally made was \$39,318.18 (Trans. 24) while the amount finally fixed by the Master was \$18,746.22, (Trans. 78) and to this holding of the Master Rauer takes no exception.

Accordingly we take it as fairly well established by the evidence that great doubt exists as to whether Rauer really has any claim whatever against either Buckman or his alias, the Sunset Construction Company. The original draft report of the Master found that he had none. But the Master, as a prudent and conservative man, finally resolved all doubts in favor of Rauer and allowed him everything that was not clearly proven to belong to the estate in bankruptcy. So far did he go in this respect that Judge Van Fleet in reviewing his report said,

“The Master, I think, if he committed any error committed it against the parties prevailing as to the extent of the accounting required.” (Trans. 202.)

But Rauer's policy of equivocation, and, in many instances, deliberate falsification,—the failure of both parties to keep proper books of account, or to render a proper account before the Master or vouchers in support thereof,—and their ingenious scheme of “exchanging checks” and taking duplicate evidences of indebtedness,—made it humanly impossible to get at the truth through the examina-

tion of hostile witnesses. Practically every witness in the case was hostile, and most of them were defendants. It does not follow, then, that there is any *admitted* debt due to Rauer. We merely suffered through the difficulties of proof to the extent that the Master hesitated, and finally concluded not to reduce his claim more than \$20,000.

(2) On the day when this case was called for argument before the Circuit Court of Appeals an affidavit was filed in behalf of Rauer showing that defendant Meadows had died some three years theretofore and it was stated orally, that counsel for plaintiff had never been informed of that fact. No suggestion of this point was ever made to the lower Court, no assignment of error is predicated upon it, and no mention of it is made in the opening brief of appellant. Yet in his reply brief (pg. 13) Rauer contends that this fact voids the so-called "interlocutory decree" against Meadows. That judgment decrees that the stock of the Sunset Construction Company which Meadows claimed to own was in reality the property of Buckman and passed to Buckman's estate in bankruptcy.

The so-called "interlocutory" decree (which was rendered in the lifetime of Meadows), vested title to these shares of stock as well as all assets of the company in Buckman's trustee in bankruptcy (Trans. 15), but no accounting was ordered in respect to said stock as nothing further remained to be done save to deliver them in accordance with the terms of that decree. The accounting was in

terms confined to the defendants other than Meadows, and the Master's report shows that Meadows did not appear before him either as an accounting party or otherwise. (Trans. 19-20.) So far as these shares of stock were concerned, the final nature of the so-called "interlocutory" decree is not open to question. The "final" decree does not refer directly or indirectly to these shares of stock and makes no mention of them. The accounting ordered was in respect of *other property* and *other parties*.

Rauer now claims that the death of Meadows, subsequent to the time when the "interlocutory" decree was made voids the judgment against Meadows because Meadows had no right to appeal therefrom. In the same breath, counsel contend that Meadows' right to appeal was confined to the so-called "final" decree *which didn't even mention these shares*,—these same shares being the only property in which Meadows had any interest. We believe that this contention shows the weakness of Rauer's position. On all principles of logic and common sense the right of Meadows to appeal should be confined to that decree which finally disposed of the property to which he claimed title,—not to the decree which ignored the very existence of that property.

(3) Rauer asserts that all his transactions were with the corporation, Sunset Construction Company, and that his books agreed with those of that concern and that the balance was clearly shown beyond dis-

pute on both sets of books. This is glaringly contrary to the evidence. Rauer dealt with Buckman, the individual, in all cases and finally took Buckman's personal and *individual* note for \$20,000 to cover the alleged corporate indebtedness. The Master's report and the argument in our first brief, pages 12-13, establish the fact that Rauer swelled his account with charges that were stricken therefrom as unwarranted and void; that these charges amounted to approximately \$20,000 (which tallies with the amount of the Buckman note, a *duplicate* evidence of indebtedness), and that Rauer's own statements under oath as to the amount of the balance due him from the Sunset Construction Company were inconsistent and thoroughly unreliable, if not worse. (Trans. 284.) Rauer rendered no explanation of these inconsistencies although he was called upon to do so, and they go far to indicate that his claim, as asserted in his accounts filed with the Master, was a false and fraudulent claim to the extent of more than \$20,000. The account claimed a balance due Rauer as of date of bankruptcy of \$39,318.18 and the Master finds the true amount then due to be \$18,746.22. This finding of the Master *is not challenged by Rauer*.

The attempted explanation of Rauer as to the reason why he omitted to include in his account payments of upwards of \$23,000 made to him by checks from the Sunset Construction Company, seems to us to be well nigh childish. He says he ceased to keep books! (Reply Brief 18.) So he

didn't enter these \$23,000 payments on the books (which the evidence showed were actually kept during this period Trans. 286-294), but merely "exchanged checks" with the Sunset. It occurs to us that if a professional usurer (and Rauer is one under the definition of the California statute, Trans. 32-33), desired to cover up his dealings with a client, and destroy evidence of the condition of his accounts, no scheme could be better convinced to accomplish that end than to "exchange checks" instead of making book entries of the transactions, and then to take duplicate evidences of the same indebtedness. Rauer did both these things and we reassert our claim that they show that the motive back of these methods was sinister and corrupt.

(4) It is stated by Rauer (Reply Brief 17) that he collected interest upon only one indebtedness. But the payments represented by these checks for over \$23,000 above referred to (and which were omitted from his account), included interest payments of \$6619. (Trans. 295.) None of these interest payments were credited either in Rauer's accounts, in his books, or on the back of the promissory notes which he held. He testified,

"I did not collect \$400 a month interest on the \$20,000 note. I never got a ten cent piece interest on that note." (Trans. 273.)

This testimony is false and its falsity is established by the stipulation of Rauer's own counsel. (Trans. p. 295.)

(5) Rauer asserts that the only creditors of Buckman were such as had claims against him arising prior to the formation of either Sunset Construction Company. There is not one word in this record which supports that assertion and, as the original Sunset was incorporated in December, 1911, and the bankruptcy was in February, 1915, the contrary would be inferred. Nor does the record show that the Brown judgment was for breach of promise. Even if it were, neither Buckman nor Rauer had a right to defeat its collection by the fraudulent manipulation of Buckman's assets, and counsel must be hard pressed indeed to attempt to prejudice this Court against the many creditors of Buckman by wholly unwarranted innuendos against one of them.

(6) In Rauer's account his dealings respecting the Academy of Sciences contract appear as a single entire transaction (Trans. 270), upon which he collected \$300 and expended \$588.85. The only testimony in respect to this matter was given by Filmore Buckman who stated that this \$300 was an old balance due from the pre-bankruptcy period and that the expenditures were for extra work done after bankruptcy for a percentage over costs. The very bill for the extra work appears on page 373 of the transcript and is for \$535 plus 10%, or \$588.50, making a total of \$588.50. This extra work, the witness says was done after bankruptcy and had nothing to do with the original contract. Thus Rauer's attempt to use it as a charge to cover up

the collection which he made of the Sunset's account is exhibited as an obvious fraud.

(7) Rauer claims (Reply Br. 24) that we 'confess' that the Reeder and Foster account was assigned *before* bankruptcy. Rauer's contention is that it did not arise until *after* bankruptcy. (Opening Br. 70.) He bases this contention upon the claim that the transcript contains a clerical error when it states (Trans. 335) that the account arose in *January, 1915*. In order to meet the claim that there was a clerical error in the transcript we quoted from a brief filed by Rauer before the Master wherein he contended that there was an assignment of this account in *January, 1915*. That purported assignment, for good and sufficient reasons, is not included in the record before this Court, and is only relevant as showing that counsels' claim that there is a 'clerical error' in the present transcript is at absolute variance with the claim which he made in the lower Court. Such changes of position require explanation.

(8) If the sale in bankruptcy of the property covered by the chattel mortgage was made for the reasons alleged on pages 25-26 of Rauer's reply brief, it is difficult to understand why the sale in bankruptcy was made, *not to Rauer*, but to his dummy. (Trans. 281) and not for \$7500, the price secured at the original sale, but for \$3750. (Trans. 367.) At the time of the bankruptcy sale Rauer cancelled on his ledger the credit for \$7500 which he had previously given to the Sunset Construction

Co. (Trans. 294) and states the reason as "Sale of personal property set aside." So the resale of this property in bankruptcy was admittedly because the prior sale by the Superior Court was void and of no effect. Rauer admitted as much when he petitioned the bankruptcy Court for a resale of the property, and his admission by conduct is stronger than any verbal admission that he could possibly make.

(9) The Reply Brief, under the heading "Chat-tel Mortgage" flatly disputes the statements made by us as to Rauer's dealings with the property covered by that mortgage. It is claimed, first, that the possession of that property, taken by Rauer, was not merely colorable. This because the option dated August, 1916 (Trans. 370), included three sand machines only, and did not mention the rest of the chattels. But if we turn to pages 333 and 334 of the transcript we find a statement of account between Rauer and Buckman which covers not only the sand machines but "track and cars" as well. This constituted practically all the valuable portion of the equipment. (Trans. 341.) In the statement Buckman is charged with certain sums representing the purchase price of the equipment and is *credited with the rentals and profits earned* by the equipment. This statement commences as of date May 1, 1916, *before* the time when Rauer filed his action to foreclose the mortgage, but *after* bankruptcy. So Rauer's possession at that time is disclosed to be colorable to the last degree. The whole situation

indicates that a plan was deliberately conceived by Buckman and Rauer as a result of which the creditors of Buckman in bankruptcy would be deprived of the revenues received from the use of these chattels, while Buckman himself would be credited with every cent earned thereby. Rauer claims he had a right during that period to credit these rents and profits upon his mortgage debt. But *he did not do so*. He credited them to Buckman, personally.

Rauer claims that he took possession of this equipment in March, 1915, and points to certain of his own testimony in the transcript which, as it there appears, will bear such a construction. But when in July, 1916, Rauer secured a collusive decree of foreclosure from the Superior Court he made that decree recite that he had taken possession of these chattels on the day before the decree was rendered. (Trans. 45.)

“The certified copy of the decree entered by consent on the day after the filing of the complaint recites * * * the delivery of the property, under mortgage to the plaintiff, in the interval between the filing of the suit and the decree on the following day.”

The testimony of McCoy, for ten years Buckman's superintendent of equipment, shows the use of this property upon the various jobs in controversy, and indicates that it was used under the direction of Buckman, who was McCoy's employer. (Trans. 339.)

This decree was rendered while the present action was pending and, immediately thereafter, Rauer executes a new option to Buckman covering the purchase of the sand machine. (Trans. 370.) When judgment in the present action was rendered by Judge Van Fleet, Rauer abandoned all claim to title to the mortgaged chattels and sought the permission of the bankruptcy Court to sell them in bankruptcy. They were sold, accordingly, in December, 1916, to Rauer's dummy, and then, for the first time his title was established. Yet as early as May, 1916, he had attempted to exercise dominion over the chattels by selling them to Buckman personally, and crediting him personally with their rents and profits. Is it any wonder that the Master decreed that these rents and profits should go to the estate in bankruptcy? The Master was clearly right, as otherwise he would have countenanced a flagrantly illegal transaction.

(10) There is another very significant fact which is developed from the history of the chattel mortgage. The appellant has printed in the transcript a document which they call "Explanation of the account of J. J. Rauer." (Trans. 85.) In this explanation they refer (Trans. 89-90-91) to the balance of the account which was stated between Rauer and Buckman in March, 1915 (immediately after bankruptcy), and which was in the sum of \$28,874.82. They claim that this represented the whole balance due to Rauer from the re-organized Sunset Construction Co. with the exception of \$4652.70 which was

omitted by inadvertence, and that the full balance then due was \$33,527.52. They claim that this full balance was secured by the chattel mortgage and that the account was stated for the purpose of laying a foundation for a foreclosure thereof.

When this foreclosure proceeding was finally brought, a consent decree was rendered therein, and that decree sets out, (1) that the chattel mortgage was given to secure notes aggregating \$15,000. (2) that the balance due on the mortgage debt (after crediting the value of the mortgaged chattels and other credits), is \$2500. (Trans. 45.)

The apparently inconsistent statements contained in these two documents (the foreclosure decree and Rauer's "Explanation of Account"), can be reconciled upon one theory, and upon one theory only. That is, that the notes for \$15,000 represented a balance due Rauer at the time they were given, which was subsequently increased to \$33,527.52 by the dealings thereafter had between the parties, and that payments thereafter made reduced this balance to \$2500 at the time the foreclosure decree was rendered. Now the balance of \$33,527.52 was claimed by Rauer to be due to him on March 15, 1915, immediately after bankruptcy, and the consent decree was rendered in July, 1916. So very large payments must have been received by him and credited upon this indebtedness between those dates. Excluding the value of the chattels (\$7500) as fixed by the consent decree, the amount of those payments would be

\$23,527.52. Yet the Master has allowed us only \$13,023.19 on this account. We submit that Judge Van Fleet was quite correct when he stated that if any error had been made in this case it was in favor of Rauer.

(11) In his first brief, pg. 70, Rauer claims error in that he is charged with \$500 as the amount collected by him from H. Iverson, and \$400 from Bosworth.

In the 'Observations upon Master's Report,' prepared and signed by Rauer's attorneys (Trans. 112), it is stated,

"The Iverson matter Mr. Rauer himself charges against his account in his statement page 6."

And then follows a statement admitting that both these charges are proper ones. Why then do Rauer's attorneys attempt in this Court to dispute the action of the Master in allowing these charges against him?

We submit that after having listened to Rauer's attorneys in the lower Court confess the propriety of charging him with certain sums, we are not to be criticized for failing to insist that the transcript should contain full details in respect to the admitted items. It is characteristic of the defendant Rauer that he should attempt to take advantage of this situation, reversing the attitude which he took below and depending upon the omissions from the transcript to justify his claim of error.

We do not believe that Rauer's methods will commend themselves to the United States Circuit Court of Appeals.

Dated, San Francisco,
December 12, 1923.

Respectfully submitted,

CHAS. S. WHEELER, JR.,
EDWIN H. WILLIAMS,
Attorneys for Appellees.

United States
Circuit Court of Appeals
For the Ninth Circuit.

BLANCHE CASCADEN, as Administratrix of the Estate of
DAVID H. CASCADEN, Deceased, (Substituted Plain-
tiff for DAVID H. CASCADEN and BLANCHE CAS-
CADEN, as Guardian of the Estate of DAVID H. CAS-
CADEN, an Insane Person,

Plaintiff in Error,

vs.

GEORGE WEBER,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
Territory of Alaska, Fourth Division.

FILED
JUN 10 1903
S. F. CALIF.

United States
Circuit Court of Appeals
For the Ninth Circuit.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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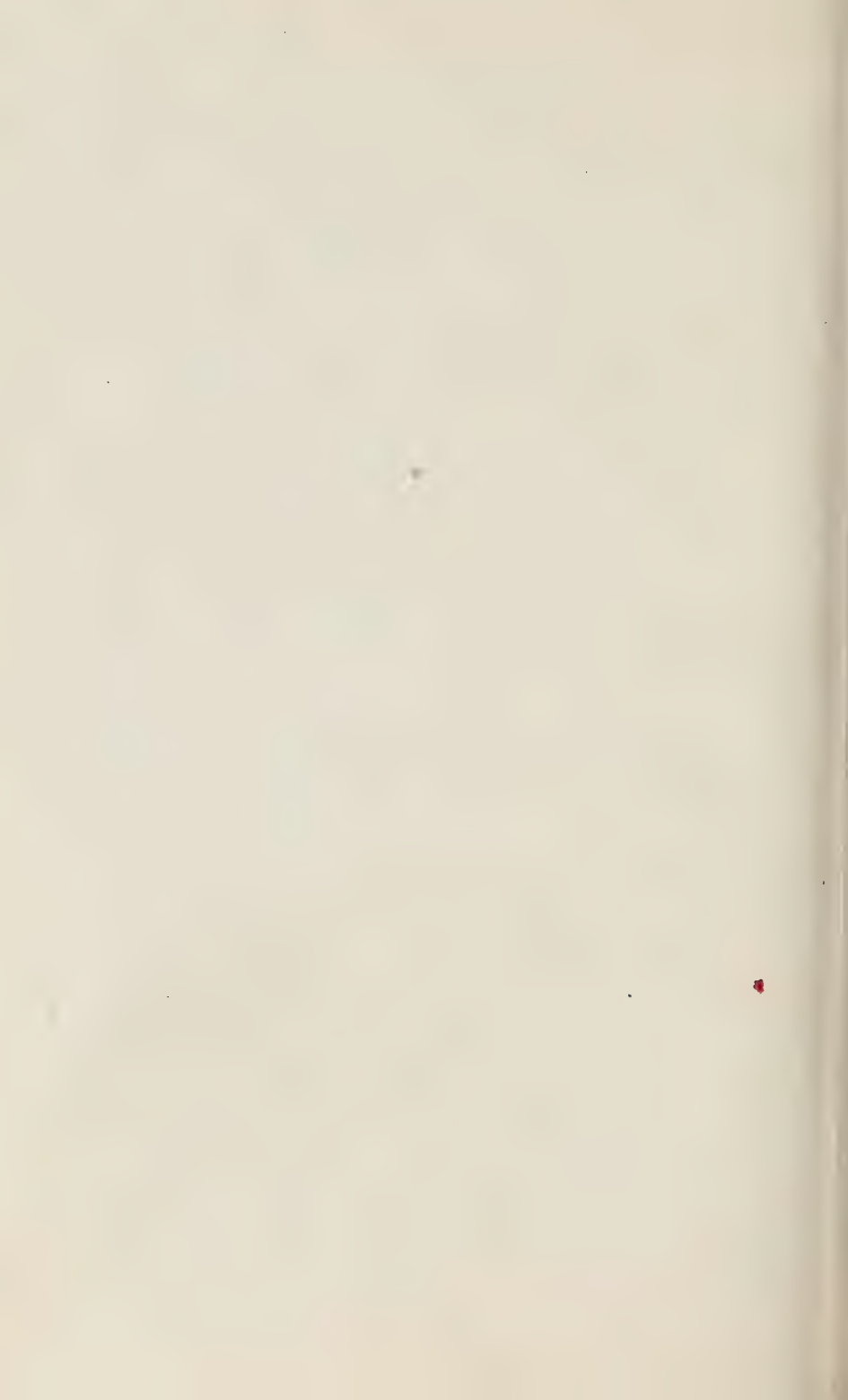
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Names and Addresses of Attorneys of Record.

JOHN A. CLARK, Attorney for Plaintiff and
Plaintiff in Error, Fairbanks, Alaska.

R. F. ROTH, Attorney for Defendant and Defendant
in Error, Fairbanks, Alaska.

[1*]

In the District Court for the Territory of Alaska,
4 Division.

No. 2579.

BLANCHE CASCADEN, as Administratrix of the
Estate of DAVID H. CASCADEN, De-
ceased,

Plaintiff,

vs.

GEORGE WEBER,

Defendant.

Stipulation Re Printing of Transcript of Record.

It is hereby stipulated that, in printing the papers and records to be used on the hearing on the writ of error in the above-entitled cause, for the consideration of the United States Circuit Court of Appeals for the Ninth Circuit, the title of the Court and cause in full on all papers shall be omitted, except on the first page of said record, and that there shall be inserted, in place of said title, on all papers used as a part of said record,

*Page-number appearing at foot of page of original certified Transcript of Record.

the words "Title of Court and Cause," also, that all endorsements on all papers used as a part of said record shall be omitted, except the clerk's file marks and the admission of service.

Dated at Fairbanks, Alaska, on this 31st day of July, A. D. 1923.

JOHN A. CLARK.

Attorney for Plaintiff in Error.

R. F. ROTH,

Attorney for Defendant in Error.

Filed Jul. 31, 1923. Robert W. Taylor, Clerk.
By Grace Fisher, Deputy. [2]

[Title of Court and Cause.]

Praeceptum for Transcript of Record.

To Rob't W. Taylor, Clerk of the above-entitled Court:

You will please prepare transcript of the record in the above-entitled cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, State of California, on writ of error heretofore perfected to said Court, and will include in said transcript the following documents, papers, and records, to wit:

- (1) Complaint.
- (2) Amended answer, as amended by interlineation.
- (3) Amended reply.

- (4) Bill of exceptions, and order allowing and settling same.
- (5) Judgment.
- (6) Petition for writ of error.
- (7) Assignment of error.
- (8) Suggestion of death and petition for substitution of party plaintiff.
- (9) Order reviving action and substituting Blanche Cascaden as administratrix of the estate of David H. Cascaden, deceased, as party plaintiff.
- (10) Order allowing writ of error and fixing cost bond.
- (11) Writ of error (original).
- (12) Citation on writ of error (original).
- (13) Undertaking on writ of error.
- (14) Order extending time for docketing and entering writ of error with Clerk of Circuit Court of Appeals (original).
- (15) Stipulation relative to printing record (original).
- (16) Praecipe for transcript.
- (17) Order extending time within which to serve and present for settlement plaintiffs' proposed bill of exceptions. [3]

This transcript to be prepared as required by law and the orders and rules of this Court and of the United States Circuit Court of Appeals for the Ninth Circuit, and to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, State of California, on or before the twenty-first day of

September, A. D. one thousand nine hundred twenty-three, pursuant to the order of this Court extending time.

Dated at Fairbanks, Alaska, on this, the 31st day of July, A. D. one thousand nine hundred twenty-three.

JOHN A. CLARK,

Attorney for Plaintiff in Error.

Due service of the foregoing praecipe and receipt of copy thereof, admitted this 31st day of July, 1923.

R. F. ROTH,

Attorney for Defendant in Error.

[Indorsed]: Filed Jul. 31, 1923, Rob't W. Taylor, Clerk. By Grace Fisher, Deputy. [4]

[Title of Court and Cause.]

Complaint.

Comes now the plaintiffs above named and complain of the defendant above named, and for cause of action, allege as follows, to wit:

I.

That on or about the 26th day of August, 1921, David H. Cascaden was, by the Probate Court in and for the Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, duly and regularly adjudged an insane person.

II.

That thereafter and on or about the 6th day of September, 1921, Blanche Cascaden, plaintiff here-

in, was by the United States Commissioner and *ex-officio* Probate Judge in and for Fairbanks Precinct, Division and Territory aforesaid, duly and regularly appointed guardian of the estate of the said David H. Cascaden, an insane person; that she thereafter duly and regularly qualified as such guardian in the manner prescribed by law, and thereupon entered on the discharge of her duties as such guardian, and ever since said time has been, and now is, the duly appointed, qualified and acting guardian of the estate of the hereinabove-named insane person.

III.

That on or about the 31st day of October, 1917, defendant above named borrowed from the Farmers Bank of Fairbanks, the sum of [5] Three Thousand Dollars (\$3,000.00), and plaintiff, David H. Cascaden, and David Petree, signed a note then and there given by said George Weber to the Farmers Bank of Fairbanks, as joint makers with the defendant above named, but said money was for the sole use and benefit of the defendant above named.

IV.

That at the time of the borrowing of said money, defendant and David Petree and plaintiff, David H. Cascaden, made, executed and delivered to the Farmers Bank of Fairbanks a certain promissory note in the words and figures as follows, to wit:

“\$3,000.00 Fairbanks, Alaska, Oct. 31st, 1917.

Six months after date, without grace, for value received, I promise to pay to the order of the

Farmers Bank of Fairbanks, at their office in Fairbanks, Alaska, the sum of Three Thousand and no/100 Dollars with interest thereon at the rate of One per cent per month from date hereof until paid; both principal and interest payable in lawful money of the United States. Interest to be paid monthly, and if not so paid the whole sum of both principal and interest shall become immediately due and Collectable at the option of the holder of this note. In the event suit is brought to collect this note, or any portion thereof, I promise to pay in addition to the costs and disbursements provided by statute, a reasonable amount for attorney's fee. For value received each and every party signing this note, either as endorser, surety, guarantor, or assignor, waives presentment, demand, protest, and notice of non-payment thereof and binds himself thereon as a principal.

(Signed) GEO. WEBER,
DAVID PETREE,
D. H. CASCADEN."

No. A—22

Due April 30th, 1918.

[Endorsements]:

"Nov.	Paid \$30.	Interest to Nov.	31—	17
Jan. 2, 1918,	paid \$30.	Interest to Dec.	31—	17
Feb. 1, 1918,	paid \$30.	Interest to Jan.	31—	18
Apr. 22, 1918,	paid \$30.	Interest to Feb.	28—	1918
Apr. 22, 1918,	paid \$30.	Interest to March	31—	1918
May 22, 1918,	paid \$60.	Interest to May	31—	1918"

V.

That thereafter and at the maturity of said note,

said George Weber failed and neglected to pay same, and plaintiff, David H. Cascaden, thereafter and on the 25th day of June, 1918, paid said principal sum of said note together with \$30.00 interest thereon. [6]

VI.

That said defendant has not paid said note to plaintiff herein, nor has he paid any part thereof, and the whole thereof is due, owing, and unpaid from defendant to plaintiff herein, together with interest on the amount paid by said plaintiff, David H. Cascaden, to wit, the sum of Three Thousand and Thirty Dollars (\$3,030.00), at the rate of one per cent per month from the 25th day of June, 1918.

VII.

That plaintiffs have been compelled to and have instituted this action to collect said note, and have become liable to their attorney for a reasonable attorney's fee, and plaintiffs allege that the sum of Six Hundred Dollars (\$600.00) would be a reasonable amount to be allowed said attorney for his services therein.

For a second and further cause of action against defendant and in favor of plaintiffs herein, plaintiffs allege as follows, to wit:

I.

That on or about the 26th day of August, 1921, David H. Cascaden was, by the Probate Court in and for the Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, duly and regularly adjudged an insane person.

II.

That thereafter and on or about the 6th day of September, 1921, Blanche Cascaden, plaintiff herein, was by the United States Commissioner and *ex-officio* Probate Judge in and for Fairbanks Precinct, Division and Territory aforesaid, duly and regularly appointed guardian of the estate of the said David H. Cascaden, an insane person; that she thereafter duly and regularly qualified as such guardian in the manner prescribed by law, and thereupon entered on the discharge of her duties as such guardian, and ever since said time has been, and now is, the duly appointed, qualified, [7] and acting guardian of the estate of the hereinabove named insane person.

III.

That on or about the 25th day of June, 1918, David H. Cascaden loaned to George Weber, the sum of Five Hundred Dollars (\$500.00), and on or about said date, said defendant, for and in consideration of said loan, made, executed, and delivered to David H. Cascaden a certain promissory note in the words and figures as follows, to wit:

“\$500.00. Fairbanks, Alaska, June 25th, 1918.

Six months after date, without grace, for value received, I promise to pay to the order of David H. Cascaden at Fairbanks, Alaska, the sum of Five Hundred and no/100 Dollars with interest thereon at the rate of one per cent per month from date until paid; both principal and interest payable in lawful money of the United States. Interest to be paid monthly, and if not so paid the whole sum of

both principal and interest shall become immediately due and collectible at the option of the holder of this note. In the event suit is brought to collect this note, or any portion thereof, I promise to pay in addition to the costs and disbursements provided by statute, a reasonable amount for attorney's fee. For value received each and every party signing this note, either as endorser, surety, guarantor, or assignor, waives presentment, demand, protest, and notice of nonpayment thereof, and binds himself thereon as a principal.

(Signed) GEO. WEBER."

Due Dec. 25/18.

IV.

That defendant has not paid said note, or any part thereof, and the whole thereof, together with interest thereon at the rate of one per cent per month from June 25, 1918, is due, owing and unpaid from defendant to plaintiff.

V.

That plaintiffs have been compelled to and have instituted this suit to collect said note, and have become liable to their attorney for a reasonable attorney's fee, which plaintiffs allege to be the sum of \$150.00, for his services in this action. [8]

WHEREFORE: Plaintiffs pray judgment against defendant as follows, to wit:

1st. On the first cause of action above set forth, the principal sum of \$3,030.00, together with interest thereon at one per cent per month from the 25th day of June, 1918, together with an attorney's fee in the sum of \$600.00

2d. On their second cause of action for the principal sum of \$500.00, together with interest thereon at the rate of one per cent per month from June 25, 1918, together with an attorney's fee in the sum of \$150.00.

3d. For costs of suit.

JOHN A. CLARK,
Attorney for Plaintiffs.

United States of America,
Territory of Alaska,—ss.

Blanche Cascaden, being first duly sworn, according to law, on her oath deposes and says: I am the duly appointed, qualified, and acting guardian of the estate of David H. Cascaden, an insane person, and am one of the plaintiffs in the above-entitled action; I have read the foregoing complaint, know the contents thereof, and the matters and things therein set forth are true, as I verily believe.

BLANCHE CASCADEN.

Subscribed and sworn to before me this 23d day of May, A. D. 1922.

[Notarial Seal] JOHN A. CLARK,
Notary Public in and for the Territory of Alaska.

My commission expires Apr. 24, 1926.

[Indorsed]: Filed May 31, 1922. Rob't W. Taylor, Clerk. By R. H. Geoghegan, Deputy. [9]

[Title of Court and Cause.]

Amended Answer.

Comes now the defendant above named and by leave of Court first had and obtained, files this his

amended answer to plaintiff's complaint on file herein and alleges and denies as follows:

I.

Answering paragraph 3 of said complaint, defendant denies that he individually borrowed from the Farmer's Bank of Fairbanks, on the third day of October, 1917, or at any other time or at all, the sum of Three Thousand Dollars for which a note was given signed by George Weber, David Petree and D. H. Cascaden, and denies that David Petree or David H. Cascaden or either of them signed said note as accommodation maker and denies that the money borrowed from said Farmer's Bank of Fairbanks was for the sole use and benefit or sole use or benefit of defendant.

II.

Answering paragraph 5 of said complaint, defendant admits that David H. Cascaden paid the promissory note set forth and described in Paragraph 4 of said complaint but denies that the same was paid at the maturity of said note or at any time prior to the third day of July, 1918, and denies that the sum of Thirty Dollars was the amount that was paid by David H. Cascaden as interest on said note and denies that any other sum than the sum of Thirty-three Dollars was paid by the said David H. Cascaden to the said [10] Farmer's Bank of Fairbanks as interest on said note.

III.

Answering paragraph 6 of said complaint, defendant denies that the said David H. Cascaden was not repaid the principal sum named in the

.

promissory note set forth and described in paragraph 4 of said complaint and denies that the said David H. Cascaden was not paid the amount of interest which he paid upon said note and denies that there is anything due, owing or unpaid from defendant to plaintiff upon said promissory note or interest.

IV.

Answering paragraph 7 of said complaint, defendant denies each and every allegation contained therein.

FOR A FURTHER, SECOND AND AFFIRMATIVE DEFENSE to the first cause of action set forth in plaintiff's complaint, defendant alleges:

I.

That the promissory note set forth and described in paragraph 4 thereof was, on the third day of July, 1918, paid in full by the Fairbanks Beverage Company by the execution of a promissory note in the sum of Three Thousand and Thirty-three Dollars (\$3033.00) and a mortgage securing the same by the said Fairbanks Beverage Company to David H. Cascaden, which said mortgage was filed for record in the office of the Recorder of the Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, on the 6th day of July, 1918, and was recorded in Volume 8 of Real Estate Mortgages at page 546 et seq. thereof and indexed in Volume 3 of Chattel Mortgage Indexes as instrument number 51538, and the same was accepted as payment in full by D. H. Cascaden, and the said note described

in paragraph IV, of plaintiff's complaint delivered up and surrendered by said Cascaden.

FOR ANSWER TO THE SECOND AND FURTHER CAUSE of action [11] set forth in plaintiff's complaint, defendant alleges and denies as follows:

Admits that on or about the 25th day of June, 1918, defendant made, executed and delivered to David H. Cascaden the promissory note set forth and described in said Paragraph 3.

II.

Answering paragraph 5 of said second cause of action defendant denies each and every allegation therein contained.

FOR A FURTHER, SECOND AND AFFIRMATIVE DEFENSE to the matters and things set forth in the second cause of action of plaintiff's complaint and as a counterclaim against said David H. Cascaden, defendant alleges:

I.

That on the fifth day of February, 1918, the plaintiff herein David H. Cascaden, together with one D. Petree, for a valuable consideration, made, executed and delivered their promissory note in writing to defendant, which said promissory note is in the words and figures following, to wit:

"\$2000.00 Fairbanks, Alaska, February 5th, 1918.

On or before July 1st, 1918, after date, without grace, for value received, I promise to pay to the order of George Weber at the office of St. George & Cathcart in Fairbanks, Alaska, the sum of Two Thousand and 00/100 Dollars with interest thereon

at the rate of one per cent per month from date hereof until paid; both principal and interest payable in lawful money of the United States. Interest to be paid at maturity and if not so paid the whole sum of both principal and interest shall become immediately due and collectible at the option of the holder of this note. In the event suit is brought to collect this note, or any portion thereof, I promise to pay in addition to the costs and disbursements provided by statute, a reasonable amount for attorneys' fees. For value received each and every party signing this note, either as endorser, surety, guarantor or assignor, waives presentment, demand, protest and notice of nonpayment thereof and binds himself thereon as a principal.

D. PETREE.

D. H. CASCADEN."

Due July 1st, 1918.

II.

That no part of said sum of Two Thousand Dollars has [12] been paid by plaintiff D. H. Cascaden or by D. Petree to defendant and that no part of the interest due thereon has been paid by said plaintiff David H. Cascaden or by said D. Petree to defendant and that the whole sum of Two Thousand Dollars, together with interest thereon at the rate of one per cent per month from the fifth day of February, 1918, is now due, owing and unpaid from plaintiff David H. Cascaden to this defendant.

III.

That defendant has been compelled to and has

employed an attorney to defend this action and to collect said promissory note of Two Thousand Dollars with interest, executed by David H. Cascaden and D. Petree and has become liable to such attorney for a reasonable attorney's fee herein and that the sum of Three Hundred and Fifty Dollars (\$350.00) is a reasonable attorney's fee herein.

WHEREFORE defendant prays judgment:

1. That plaintiff take nothing herein;

2. That defendant have judgment against plaintiff David H. Cascaden for the sum of Fifteen Hundred Dollars principal with interest on \$2000.00 at the rate of one per cent per month from the 5th day of February, 1918, to the 25th day of June, 1918, together with interest at the rate of one per cent per month on \$1500.00 from the 25th day of June, 1918.

3. For the sum of \$350.00 attorney's fees.

4. For costs and disbursements herein expended.

R. F. ROTH,

Attorney for Defendant. [13]

United States of America,
Territory of Alaska,—ss.

George Weber being first duly sworn, deposes and says:

That he is the defendant named in the foregoing action; that he has read the foregoing answer and counterclaim; knows the contents thereof and that the same is true as he verily believes.

GEO. WEBER.

Subscribed and sworn to before me this 31st day of March, 1923.

[Notarial Seal]

R. F. ROTH,

Notary Public in and for Alaska.

My commission expires Nov. 14, 1925.

Service of the foregoing answer and counterclaim is hereby admitted this 19th day of July, 1922, it being understood and agreed that the foregoing answer and counterclaim may be filed without verification but that the same is to be verified according to law before trial.

JOHN A. CLARK,

Attorney for Plaintiffs.

[Endorsed]: Filed Jul. 19, 1922. Rob't W. Taylor, Clerk. By Frank Bishoprick, Deputy. [14]

[Title of Court and Cause.]

Amended Reply.

Come now the plaintiffs above named and file this their amended reply to the so-called affirmative defenses set forth in defendant's amended answer, as amended by interlineation, and admit, deny, and allege as follows, to wit:

I.

For reply to the so-called further, second, and affirmative defense to the first cause of action, as found on page 2 of defendant's amended answer:

(1) Plaintiff admits that, on or about the 3d day of July, 1918, the Fairbanks Beverage Company executed and delivered to plaintiff David H.

Cascaden a promissory note in the sum of \$3,033.00 and a mortgage securing the same, which mortgage was filed as alleged in said so-called further, second, and affirmative defense.

(2) Deny that said mortgage was accepted as payment in full of said note described in the complaint, or as a payment thereon.

(3) Deny that said promissory note, sued on by plaintiffs and described in plaintiffs' complaint, paragraph 4, was delivered up and surrendered by said Cascaden. [15]

(4) Deny that the said note and mortgage were accepted in full payment, or payment at all, of said indebtedness described in plaintiffs' complaint, or that it was accepted otherwise than as security for the amount due to said David H. Cascaden, and plaintiffs deny that said note, or any part thereof, has ever been paid.

II.

For a further affirmative reply to the so-called further, second, and affirmative defense to plaintiffs' first cause of action, plaintiffs allege:

(1) That said mortgage, described in said so-called second affirmative defense, was a second mortgage on said property situate in Fairbanks, and that said mortgage has never been paid, and on a foreclosure of the first mortgage on the property described in said mortgage, given by the Fairbanks Beverage Company to David H. Cascaden for \$3,033.00, said property did not sell for sufficient to pay the first mortgage, and the second mortgage remains wholly unpaid.

III.

For reply to the so-called further, second, and affirmative defense to the matters and things set forth in the second cause of action in plaintiffs' complaint, and as a counterclaim against David H. Cascaden, plaintiffs admit, deny, and allege as follows, to wit:

(1) Deny the allegations of paragraph 1 of said so-called further, second, and affirmative defense.

(2) Replying to paragraph 2 thereof, plaintiffs admit that no part of said promissory note, or interest, has been paid, but deny each and every other matter and thing therein contained.

(3) Replying to paragraph 3 thereof, plaintiffs deny each [16] and every matter and thing therein contained.

IV.

For a further affirmative reply to said so-called further, second, and affirmative defense to plaintiffs' second cause of action, plaintiff alleges as follows, to wit:

(1) That the promissory note described in paragraph 1 of said so-called second affirmative defense, as set forth in paragraph 3 of the amended answer was, at the time of the making thereof, and ever since has been, without consideration, and that neither the plaintiff David H. Cascaden nor David Petree was or is liable to defendant in any sum whatsoever by reason of the making of said note.

V.

For a further and second affirmative reply to the matters and things set forth in said further, second,

and affirmative defense to plaintiffs' second cause of action, plaintiffs allege as follows, to wit:

(1) That, prior to the 5th day of February, 1918, David H. Cascaden, George Weber, and David Petree had purchased from one Frank Allberg certain property in the town of Fairbanks, Alaska, and the purchasers paid on account of the purchase price the sum of approximately \$6,000.00, and there remained due to said Allberg the sum of approximately \$3,000.00.

(2) That George Weber, defendant in said action, fearing that he might be compelled to pay the balance of the said purchase price of said property to said Allberg in the absence of David H. Cascaden and David Petree, and as a protection in the event that he should be compelled to make such payment, procured from said David H. Cascaden and David Petree the promissory note [17] described in paragraph three of defendant's answer, which said promissory note was to be paid by said David H. Cascaden and David Petree to said Weber, in the event that Weber was compelled to pay to said Allberg the \$3,000.00 balance of the purchase price on the property purchased from said Allberg and described above, but not otherwise. That said note was intended to reimburse said Weber in the event he paid the proportion of the balance of the purchase price that was properly payable by said Cascaden and said Petree.

(4) That said Weber never paid to said Allberg the balance of said purchase price of said property, and the consideration for said note failed, and said

note is without consideration and is void, and plaintiff herein David H. Cascaden is not now, and never has been, liable for the payment of any part or portion thereof.

WHEREFORE, plaintiffs pray that defendant take nothing by his so-called affirmative defense, and that plaintiffs have judgment as prayed for in their complaint on file herein.

JOHN A. CLARK,
Attorney for Plaintiffs.

United States of America,
Territory of Alaska,—ss.

Blanche Cascaden being first duly sworn according to law, on oath deposes and says:

As guardian of the estate of David H. Cascaden, an insane person I am one of the plaintiffs named in the above-entitled action; I have read the foregoing amended reply, know the contents thereof, and verily believe it to be true.

BLANCHE CASCADEN.

Subscribed and sworn to before me on this the 4th day of February, A. D. one thousand nine hundred twenty-three.

[Seal] JOHN A. CLARK,
Notary Public in and for the Territory of Alaska.

My commission expires 24 April, 1926. [18]

Due service hereof admitted this 7 February, 1923.

R. F. ROTH,
Attorney for Defendant.

[Indorsed]: Filed Feb. 7, 1923. Rob't W. Taylor, Clerk. By Frank O'Farrell, Deputy. [19]

[Title of Court and Cause.]

Order Extending Time to and Including May 20, 1923, to File Bill of Exceptions.

This matter coming on for hearing on the application of the plaintiffs above named for an extension of time within which to prepare, serve, and present to this Court for settlement their proposed bill of exceptions in the above-entitled cause, and it appearing to this Court that the time allowed by law is not sufficient to enable plaintiffs to have the record in said cause transcribed and to prepare and serve their said proposed bill of exceptions, and the Court being duly advised in the premises;

Now, therefore, it is ordered, that said plaintiffs be, and they are, hereby given and granted until and including the 20th day of May, A. D. one thousand nine hundred twenty-three, within which time to prepare, serve, and present to this Court for settlement their proposed bill of exceptions in the above-entitled cause.

Done at Fairbanks, Alaska, on this, the 27th day of April, A. D. one thousand nine hundred twenty-three.

CECIL H. CLEGG,
District Judge.

Entered in Court Journal No. 15, page 728.

[Endorsed]: Filed Apr. 27, 1923. Rob't W. Taylor, Clerk. By Frank O'Farrell, Deputy.
[20]

[Title of Court and Cause.]

Bill of Exceptions.

BE IT REMEMBERED that heretofore and on, to wit, March 31, 1923, at the hour of 10:00 o'clock A. M., the above-entitled cause came regularly on for trial in the above court, and before the Honorable Cecil H. Clegg, the Judge of said court, sitting with a jury;

The plaintiff Blanche Cascaden appearing in person and by John A. Clark, Esq., her attorney and counsel;

The defendant appearing in person and by R. F. Roth, Esq., his attorney and counsel;

Whereupon the following proceedings were had and done, to wit: [21]

A jury was duly empaneled and sworn, and counsel for plaintiffs and defendant respectively made their opening statements to the jury.

Testimony of Mrs. Blanche Cascaden, for Plaintiffs.

MRS. BLANCHE CASCADEN, one of the plaintiffs, called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. CLARK.)

Q. Your name is Blanche Cascaden?

(Testimony of Mrs. Blanche Cascaden.)

A. Yes, sir.

Q. You are the guardian of the estate of David H. Cascaden, an insane person? A. Yes, sir.

Q. Mrs. Cascaden, I show you this instrument and ask you if that is the promissory note that is set forth in the first cause of action in your complaint? A. Yes, sir; I believe it is.

Mr. CLARK.—We offer this in evidence and ask to have it marked Plaintiffs' Exhibit "A."

Mr. ROTH.—We have no objection.

The COURT.—It may be admitted.

Promissory note referred to received in evidence, marked Plaintiffs' Exhibit "A" and made a part of the record herein.

Q. I show you this second paper and ask you if that is the promissory note signed by George Weber described in your second cause of action? [22]

A. Yes, sir; I believe it is.

Mr. CLARK.—We offer this in evidence and ask to have it marked Plaintiffs' Exhibit "B."

Mr. ROTH.—We have no objection.

The COURT.—Very well, it may be so marked.

Promissory note referred to received in evidence, marked Plaintiffs' Exhibit "B" and made a part of the record herein.

Mr. CLARK.—That is all.

Mr. ROTH.—No cross-examination.

(Witness excused.)

* * * * * * * *

Testimony of George Weber, for Plaintiffs.

GEORGE WEBER, the defendant, called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. CLARK.)

Q. Your name is George Weber?

A. Yes, sir.

Q. You are the defendant in the action?

A. I believe so.

Q. I show you this instrument marked Plaintiffs' Exhibit "A," being a promissory note for three thousand dollars, dated October 31, 1917, due six months after date, signed by George Weber, David Petree and [23] D. H. Cascaden. A. Yes, sir.

Q. You have seen that note before, have you?

A. I guess I have, if I signed it. That is my signature.

Q. Was any part of the money that was realized on that note for Dave Cascaden personally?

Mr. ROTH.—We object to that on the ground the same is irrelevant, incompetent and immaterial, not embraced within the issues in this case, because it is alleged that Petree and Cascaden both signed it as accommodation makers for Mr. Weber. Until the proper foundation is shown that this money was borrowed by George Weber personally, any other testimony is incompetent, irrelevant and immaterial. Under the pleadings here it must ap-

(Testimony of George Weber.)

pear first that George Weber borrowed this money for himself.

The COURT.—The question was, was any of this money for the personal benefit of Cascaden.

Mr. ROTH.—All right, I withdraw the objection, then.

Q. Was any of this money for the personal use of Mr. Cascaden? A. The original?

Q. Yes, the original loan?

A. Signed on October 31, 1917?

Q. Yes. A. No.

Mr. CLARK.—That is all. [24]

Cross-examination.

(By Mr. ROTH.)

Q. You were asked if any of the amount in there was for David H. Cascaden. State for whom it was.

Mr. CLARK.—Now we object, if the Court please, as not cross-examination. He can recall Mr. Weber as his own witness. We asked the one question, whether it was for David Cascaden, and he says it is not.

Mr. ROTH.—Now I want to know who it is for.

The COURT.—Objection overruled.

Mr. CLARK.—We just note an exception.

The COURT.—Exception allowed.

Q. (Continuing.) So that you won't be mistaken, there is the note we are talking about. Plaintiffs' Exhibit "A" (handing same to witness).

A. Well, the Beverage Company was organized then—

(Testimony of George Weber.)

The COURT.—Take it easy and don't talk so fast.

Q. All I am asking you, George, is who borrowed that money—for whom was that money borrowed?

A. Originally Petree and myself borrowed it from the bank. This was the substitute note.

Q. I am not asking you about that. It was you and Petree that borrowed the money?

A. Yes, sir.

Q. And Cascaden was not in on it at all?

A. Not in the beginning.

Q. Did Cascaden have anything to do with it at that time? A. No, sir.

Q. At the time that you borrowed it did Cascaden sign it? [25] A. No, sir.

Mr. ROTH.—That is all.

(Witness excused.)

Mr. CLARK.—Plaintiffs rest.

(Plaintiffs rest their case in chief.)

Mr. ROTH.—If the Court please, at this time the defendant George Weber moves for a nonsuit as against the first cause of action set forth in this complaint for the reason that the same does not prove the allegations of the complaint with reference to that cause of action and that there is an entire failure of proof on that cause of action.

The COURT.—The motion will be denied.

Mr. ROTH.—We desire an exception.

The COURT.—Exception allowed.

* * * * *

Testimony of George Weber, in His Own Behalf.

GEORGE WEBER, the *plaintiff*, called as a witness on his own behalf, having been previously sworn, testified as follows:

Direct Examination.

(By Mr. ROTH.)

Q. Mr. Weber, I hand you a promissory note which is marked Plaintiffs' Exhibit "A." I will ask you to state whether or not the sum named in that promissory note, or the amount borrowed from the Farmers Bank as set forth in [26] that note, was for your personal use? A. No, sir.

Q. I will ask you to state whether any part of it was for your personal use.

A. Well, part of it was, half of it was.

Q. For your personal use?

A. No, no, by the bottling works.

Q. I understand, but for your own personal use?

A. No.

Mr. CLARK.—What do you mean by personal use?

A. (Continuing.) It was for the bottling works.

Q. That is what you have alleged in your complaint here. Was it for your personal benefit?

A. It was for the bottling works.

Q. I understand, but your personal benefit as segregated from Dave Petree?

A. I don't understand you, Mr. Roth. We bought the bottling works together.

Q. Who? A. Mr. Petree and myself.

(Testimony of George Weber.)

Q. And this was for payment on that?

A. On that; yes, sir.

Q. Well, it wasn't for any separate business of your own? A. No, sir.

Q. It was on a partnership between you and Petree? A. Yes, sir.

Mr. CLARK.—We object to putting the words into the witness' mouth.

Mr. ROTH.—He already stated that.

Mr. CLARK.—He did not. You are making a partnership [27] proposition out of it.

The WITNESS.—That is what it was, Mr. Clark.

The COURT.—Already answered.

Q. Who signed that note originally?

A. Mr. Petree and myself.

Q. When, on the day that it bore date?

A. On October 31st.

Q. And when did David H. Cascaden sign it?

A. Well, when the note was due we couldn't pay it—

Q. (Interrupting.) Who couldn't pay it?

A. Mr. Petree and myself couldn't pay it to the bank, and Mr. Petree induced Mr. Cascaden to sign it, and the bank was satisfied with it.

Q. What did the bank agree to do if Mr. Cascaden signed it? A. It was for the bottling works.

Q. When Cascaden signed the note—what did the bank agree to do if Cascaden would sign it, if anything?

A. Extend the note again until it could be paid.

Q. Was there any time mentioned?

(Testimony of George Weber.)

A. Well, sixty days.

Q. Sixty days?

A. Yes, sir—April, May and June—yes, sixty days.

Q. When you borrowed that money originally did you secure the note?

A. With a mortgage, yes, sir, to the bottling works down below and what we had bought besides, Mr. Petree and myself.

Q. Mr. Petree and yourself? A. Yes, sir.

Q. Was that mortgage recorded? [28]

A. Yes, sir.

Q. In the note that is copied into that mortgage that is recorded is David H. Cascaden's name attached to it?

Mr. CLARK.—Just one moment. We object as not the best evidence.

Mr. ROTH.—Well, I will follow that up.

Mr. CLARK.—Are you going to produce the mortgage?

Mr. ROTH.—I am going to produce the record of it; I haven't the mortgage.

Mr. CLARK.—Well, that is the best evidence, that shows.

Q. Now, after the sixty days expired, which would be the 30th day of June?

A. Of June, yes, sir.

Q. Just state what happened with reference to the note, state what occurred.

A. Mr. Cascaden came up to the bottling works one day and he said, "You will make out a note to

(Testimony of George Weber.)

me and a mortgage, I paid the note to the Farmers' Bank." Mr. St. George stopped him on the street and asked him about it, and he got sore about it and he paid it, and we transferred a mortgage on the bottling works to Mr. Cascaden then.

Q. You mean you made a new mortgage?

A. Yes, a new mortgage. The insurance also went all to Mr. Cascaden's name. And he also told me to withdraw all the business from the Farmers Bank and put it back in the First National Bank. He was sore at that outfit there.

Q. Now, how much was that new note made for?

A. \$3033.00.

Q. \$3033.00? [29] A. Yes, sir.

Q. What was the \$33.00 for?

A. For interest intervening from the time it was due and unpaid till the new note was made out.

Q. The amount of interest that was unpaid on it?

A. Unpaid on it.

Q. Unpaid? A. Yes, sir.

Q. Which was \$33.00? A. Yes, sir.

Q. I hand you a note here that has marked across the face of it "Filed in the District Court, Territory of Alaska, Fourth Division, April 18, 1922, Robert W. Taylor, Clerk, by Frank Bishoprick, Deputy," and has written in red ink "Exhibit 'C,' Blanche Cascaden as Guardian, Fairbanks Beverage Co'y, a corporation," and ask you to state if you know what that note is?

A. This is the note that was made out with the mortgage to Mr. Cascaden in lieu of that one he took up from the Farmers Bank.

(Testimony of George Weber.)

Q. That note, as I understand you, was made to Cascaden in lieu of this—

A. (Interrupting.) Of this one, yes, sir (indicating).

Q. Of this note which is Plaintiffs' Exhibit "A" in this case?

A. Yes, sir. At that time we were organized, the Beverage Company was organized.

The COURT.—That would be in payment of it, wouldn't it?

Q. That was in payment of this note? [30]

A. When the mortgage was foreclosed.

Q. Was that in payment of this note?

A. Yes, sir.

Mr. CLARK.—Just a moment. If the Court please, there hasn't been any testimony it was in payment of the note, it was merely this note was given to him. They haven't produced any evidence to show that it was accepted as payment of that note. We admit that note was for the same amount and was given at that time, but we do not concede that it was accepted as payment or cancellation of the old note, because the old note was never surrendered.

Q. What was this note given for?

A. For the same amount that Mr. Cascaden paid to the Farmers Bank.

Q. Was it given to pay Cascaden for this note?

A. Exactly.

Mr. CLARK.—We object, if the Court please.

(Testimony of George Weber.)

That is a leading and suggestive question; that is the point involved.

Mr. ROTH.—Of course, it shows on its face.

The COURT.—Overruled.

Q. Did you give Mr. Cascaden a mortgage?

A. Yes, sir.

Mr. ROTH.—Now, if the Court please, in this case instead of bringing up the record I will ask to introduce the complaint in this case No. 2560, which is a record of this court, with which papers this \$3033.00 note was filed that [31] I have just called the witness' attention to. I ask to have the complaint in that case received in evidence in this case.

The COURT.—Any objection?

Mr. CLARK.—I have no objection at all.

The COURT.—Very well, it may be admitted and a certified copy substituted.

Complaint in cause #2560 received in evidence, marked Defendant's Exhibit 1 and made a part of the record herein.

Mr. ROTH.—And I ask to have this note for \$3033.00, dated July 3, 1918, which is on file in case No. 2560, also received in evidence in this case.

Mr. CLARK.—No objection.

The COURT.—It may be admitted.

Note referred to received in evidence, marked Defendant's Exhibit 2 and made a part of the record herein.

Mr. ROTH.—I simply want to read the third cause of action to the jury, if the Court please.

(Testimony of George Weber.)

Mr. CLARK.—Better read the first, which shows the first mortgage and shows this was given as a second mortgage.

Mr. ROTH.—That is the only part I want to introduce. I want to prove that there was a mortgage taken, that's all, but whether the first, second or third, I am not interested in that at all.

(Reading third cause of action of Defendant's Exhibit 2 to the jury.)

If the Court please, I now offer in evidence the motion for default in case No. 2560 in this case.

Mr. CLARK.—No objection. [32]

The COURT.—It may be admitted.

Motion for default in cause #2560 received in evidence, marked Defendant's Exhibit 3 and made a part of the record herein.

Mr. ROTH.—I presume it will not be necessary to read this default to the jury. Might just as well, though.

Mr. CLARK.—To save all that I will admit that we secured a default against the Fairbanks Beverage Company, the default was entered, thereafter a judgment was entered, and that will save the reading of those papers.

Mr. ROTH.—You will stipulate, then, that the record in that case 2560 is introduced in this case without the necessity of reading the same?

Mr. CLARK.—Yes.

The COURT.—All right, the whole record. That will be Exhibit 4.

Mr. CLARK.—And either party can refer to such portions of the record as they see fit.

(Testimony of George Weber.)

Mr. ROTH.—By stipulation we will stipulate it is in the case now, it is in evidence in this case without a certified copy of it.

The COURT.—Very well.

Files in cause #2560 received in evidence, marked Defendant's Exhibit 4 and made a part of the record herein.

Q. Mr. Weber, when Mr. Cascaden paid that three thousand dollar note upon which \$3033.00 were due, including the interest, at that time had the Fairbanks Beverage Company been organized?

A. Yes, sir. [33]

Q. State whether or not David H. Cascaden was a member of the Fairbanks Beverage Company, a stockholder in it? A. Yes, sir.

Q. Was he a large stockholder, do you remember? What proportion of the stock did he own?

A. If I remember the proportion was like this—

Mr. CLARK.—One moment. I think that is not the best evidence. I think the stock books is the best evidence of what he owned at that time.

The COURT.—You may answer if you know. Objection overruled.

Q. What proportion of the stock?

A. About one-fifth of the stocks. Mr. Petree—I had one-fourth—no, I had one-sixth, Mr. Cascaden one-fifth, and the balance was to Mr. Petree, but most of it was mortgaged to Mr. Cascaden, Mr. Petree's stocks.

Q. Now, when the Fairbanks Beverage Company was organized state what it did with reference, if

(Testimony of George Weber.)

anything, to the indebtedness of the former Beverage Company? A. Well, Mr. Cascaden had—

Mr. CLARK.—(Interrupting.) Well, one moment, if the Court please. We object on the ground it is not the best evidence. If this is a corporation they certainly must have the books and records showing what they did, and his testimony is incompetent.

Mr. ROTH.—I withdraw the question. I just wanted to show the history of this. It isn't really material, so I will withdraw the question, if the Court please. [34]

Q. Mr. Weber, I hand you now a promissory note signed by D. Petree and D. H. Cascaden, dated February 5, 1918, payable to yourself. I will ask you to state what the indebtedness named in that note was for; explain that note.

A. Mr. Petree and myself bought the bottling works in the fall of 1917, and he shipped us some stuff in. In fact, we had a complete plant besides that one down there, besides buying that plant in the spring. We started buying that plant in the spring. We couldn't agree on the price, and so as not to be left we shipped our own plant in. We finally bought and we agreed on the price. We had two plants then. And afterwards the brewery closed down, and the business was carried on with Webber and Petree, and the brewery was dead, and we had not organized, and to keep the thing going we carried it on as Webber and Petree, and

(Testimony of George Weber.)

that was carried on that way until the 27th of April, 1918, when we organized.

Q. But how did that note come to be given?

A. I went outside—I left Fairbanks on the 6th of February.

Q. What year? A. '18.

Q. 1918?

A. Yes, sir. I went to an institution in Milwaukee for brewers, who were scientific brewing companies. It was a short course on account of members all knowing their business, and they said they would teach all the methods of improving near-beer, and how to change a brewery plant, adapt it to the new methods we had to use in [35] order to keep it going, and they decided I go out and take that course, and incidentally I bought some stuff and looked around. And on the day before I left, why, they figured up how we stood about our transaction with Mr. Petree and myself about shipping in that stuff and buying the bottling works, and Mr. Petree gave me that note.

Q. But why did he give you the note?

A. Because he owed me money very likely.

Q. Owed you how much money?

A. That amount what it says for.

Q. You figured out—

Mr. CLARK.—(Interrupting.) Now,—

Q. (Interrupting.) Just state, now, in what amount he gave you that note for?

A. Well, the amount the note calls for.

(Testimony of George Weber.)

Q. I know, but how much did he owe you at that time personally when you figured up?

A. Well, what the note calls for. He wouldn't give me anything else or any less.

Q. And did Cascaden owe you anything at that time? A. No, sir.

Q. How does his name come to be on there?

A. Mr. Petree induced him to sign it.

Q. And that is made payable six months after date?

A. Yes, sir. Because the day I left Mr. Petree wanted to see me down at the hotel here, because he wouldn't be up in the morning before I left, and when I came down there about 9:00 o'clock he said, "About that note I give you to-day, if I cannot settle it before I will [36] settle it when I organize." And I figured he would give me shares for it, but when he come to organize he had nothing to give away because he only held one share himself after all, he only owned one share.

Q. Then, as I understand, before you left you and Petree figured up the business between you?

A. Yes, sir.

Q. And this note was the evidence of how you and Petree stood at that time personally?

A. Yes, sir.

Q. Was any part of that note ever paid to you?

A. No.

Q. I show you another note for five hundred dollars, dated June 25, 1918, signed by George Weber, payable to David Cascaden. A. Yes, sir.

.(Testimony of George Weber.)

Q. Explain that note.

A. When I came back from the outside I paid my own fare.

Q. Now go slow because the reporter can't get you.

A. I paid my own fare out and back. The firm gave me two hundred and fifty dollars tuition for that course out there I took. I was there two weeks, but I paid my own fare in and out. I looked up several places, and when I came back I was short of money. And Mr. Petree, when he didn't come through when we organized, I knew there was no use after that. By that time I realized—

Q. (Interrupting.) Snow, now.

A. (Continuing.) I realized how bad he was off financially, and I asked Mr. Cascaden if he could help me out, I had to pay my life insurance and other things, and I needed [37] some money, and Mr. Cascaden gave me the money and I gave him that note.

Q. How much money? A. \$500.00.

Q. And how did you come to give him a note for it?

A. Well, he wouldn't accept it on this note here, on the other one I had from Mr. Petree, because he didn't owe it to me.

Q. I see.

A. He says, "Keep that separate, let it stand that way." And before Mr. Petree left I tried to get some money from him yet to pay this note, that

(Testimony of George Weber.)

is all I wanted to pay, but I know he didn't have anything.

Mr. ROTH.—If the Court please, we ask that this note for \$2,000.00 be received in evidence.

Mr. CLARK.—No objection.

The COURT.—It may be admitted.

Note referred to received in evidence, marked Defendant's Exhibit 5, and made a part of the record herein.

Mr. ROTH.—And also the note for \$500.00 that you sued on.

Mr. CLARK.—That is already in.

Q. That note for five hundred dollars that you gave to Cascaden, you didn't pay anything on that note? A. No.

Q. But in this suit on this note of two thousand dollars you give credit for that five hundred dollar note? A. Yes, sir.

Q. Full credit? A. Yes, sir. [38]

Q. Now you said that Cascaden—you talk very fast, Mr. Weber—when Cascaden signed that note, that two thousand dollar note, see? A. Yes.

Q. He didn't at the time he signed that owe you anything? A. No.

Q. Then why did he sign that note?

A. Well, to accommodate Mr. Petree, I suppose.

Q. Of course, you don't mean to say that he didn't owe you on that when he signed that note?

Mr. CLARK.—We object, if the Court please, as a conclusion of law.

The COURT.—I will overrule the objection.

(Testimony of George Weber.)

Mr. CLARK.—Note an exception.

The COURT.—Exception allowed.

Q. What did you mean to say a while ago when you said that Cascaden didn't owe you? Did you mean to say that he told you that he didn't owe you, or what?

A. In what reference, Mr. Roth, please?

Q. I asked you when you borrowed this five hundred dollars from Cascaden—

A. (Interrupting.) Yes.

Q. (Continuing.)—why you didn't credit it on that two thousand dollar note, or something to that effect.

A. Well, he said it was Mr. Petree's note, not his note.

Q. That Mr. Petree owed you the money?

A. Owed me the money, yes.

Q. And he wanted Petree to pay it?

A. Yes.

Q. But he was on there as surety at least? [39]

Mr. CLARK.—We object, if the Court please. That is for the jury to determine, how he was on there, and he is asking for a conclusion of the witness.

Q. Did you mean to say that Dave Cascaden didn't owe you on that note which he signed of yours?

Mr. CLARK.—We object, if the Court please, as having already been answered. He has explained the whole circumstance.

The COURT.—Overruled.

(Testimony of George Weber.)

Mr. CLARK.—Note an exception.

The COURT.—Exception allowed.

Q. Did you mean to say that Dave Cascaden didn't owe you that two thousand dollar note?

A. Well, after he signed it.

Q. Of course. After he signed it, then do you claim he owed you?

A. That is evidence of any note. If I go on a note I am responsible for it, as I understand it.

Q. In order to collect this note for two thousand dollars with interest that is due on it did you employ an attorney? A. Yes, I had to.

Mr. ROTH.—You may cross-examine the witness.

Mr. CLARK.—If the Court please, if it is agreeable to the Court I would ask the adjournment be taken until 2:30, as I am subpoenaed to appear at 1:30 in an insanity case.

The COURT.—We will take a recess until 3:00 o'clock.

(Whereupon an adjournment was taken until 3:00 o'clock P. M.) [40]

Afternoon Session.

Saturday, March 31, 1923, 3:00 P. M.

GEORGE WEBER, on the stand.

Cross-examination.

(By Mr. CLARK.)

Q. Mr. Weber, you and Mr. Petree bought the Tanana Bottling Works, didn't you?

A. Yes, sir.

Q. October 31, 1917? A. '17, yes.

(Testimony of George Weber.)

Q. How much did you pay for the bottling works?

A. Nine thousand dollars. That was the price.

Q. How much was paid in cash?

A. Three thousand.

Q. Who paid it? A. Mr. Petree and myself.

Q. How much did you put up?

A. I put up my share.

Q. How much was that? A. Fifteen hundred.

Q. You are sure that you put up the fifteen hundred at that time? A. Yes.

Q. That only accounted for three thousand. Now where was the rest of it, where did the rest of it come from?

A. Three thousand dollars borrowed from the Farmers Bank and three thousand we still owed.
[41]

Q. Where is that note that you gave to Ahlberg for the remaining three thousand dollars?

A. That is in the possession of Mr. Roth, I believe.

Q. That has never been paid, has it? A. No.

Q. That is signed by you and Petree?

A. Yes.

Q. Then that three thousand dollars that was borrowed from the Farmers Bank was the second three thousand that was paid on account?

A. Yes.

Q. You went outside in the spring of 1918, didn't you? A. February 6th I left here.

Q. You had received some word from Ahlberg

(Testimony of George Weber.)

before that, hadn't you, about him wanting the balance of his money?

A. Not personally. That time St. George was agent and Cathcart were agent for Ahlberg.

Q. You expected to see Ahlberg when you went outside, didn't you? A. Yes.

Q. You knew Ahlberg was going to try to collect the balance of the three thousand, didn't you?

A. Well, of course he very likely would.

Q. How much of the purchase price of the Tanana Bottling Works were you to pay?

A. Four thousand five hundred.

Q. And you paid fifteen hundred? A. Yes.

Q. And that's all that you ever paid on account of it? A. Yes. [42]

Q. Now isn't it a fact, Mr. Weber, that at the time you were going outside Mr. Petree gave you a note for two thousand dollars for fear you might be compelled to pay the three thousand dollars that was still owing to Ahlberg?

A. I understand that it was money Petree and I had dealings with before.

Q. What were your dealings before?

A. He shipped some stuff in from the outside for our new bottling works in case we shouldn't buy that other one there.

Q. Who paid for that stuff that was shipped in?

A. Petree and myself.

Q. How much did you pay?

A. I don't recollect.

Q. How much did Petree pay?

(Testimony of George Weber.)

A. I don't know.

Q. About how much was paid altogether?

A. I couldn't recollect anything about it, Mr. Clark.

Q. How did it figure out that Petree owed you just two thousand dollars?

A. That is what we figured up that time.

Q. Isn't it a fact, Mr. Weber, that note was given to you to protect you in the event that you had to pay to Ahlberg the balance of that three thousand dollars?

A. Not as I recollect it.

Q. Now isn't it possible that is what it was given for? A. I don't think so.

Q. Didn't you tell Mrs. Cascaden that that is what it was given for? [43]

A. No, not as I recollect.

Q. Mr. Weber, you remember last spring, that is, in the spring and early summer of 1922, there was some litigation between yourself and the Cascaden estate? A. Yes, sir.

Q. And you finally settled the litigation, it was finally settled? You remember that, don't you?

A. It was settled by foreclosure, yes.

Q. No, you remember the suit that you brought, Mrs. Cascaden settled it and gave you some syrups and other stuff that was up there?

A. That was William Bittner.

Q. It represented a part of your account, didn't it? A. Of some wages we put in, yes.

(Testimony of George Weber.)

Q. You remember when that case was settled, don't you? A. Yes.

Q. Do you remember a day or two after that was settled about having a talk with Mrs. Cascaden at the gate where she was living up at the Heilig house? A. Oh yes, that is correct.

Q. Do you remember her at that time asking you how it happened that Dave Cascaden owed you any money? Do you remember her asking you that? A. About this note, yes, that's correct.

Q. Did you not say to her at that time that "Dave Cascaden doesn't owe me anything"?

A. Well, originally it was Mr. Petree's note, yes.

Q. Well, didn't you tell her that Dave Cascaden didn't owe you anything, that Petree is the man who owed you the money? [44]

A. Originally, yes.

Q. And didn't you tell her at that time that when you were getting ready to go outside you were afraid that you might have to pay the Ahlberg note and that that note was given, this note for two thousand dollars was given to you to protect you against having to pay all of that three thousand dollar note?

A. Not the same words to the same effect, no, Mr. Clark.

Q. Didn't you tell her in effect that was what that note was given for?

A. No, I could have had protection perhaps if I had asked for it.

(Testimony of George Weber.)

Q. Did you not tell her that was given to you for protection? A. No.

Q. You are certain of that? A. Yes.

Q. In order to just refresh your memory so there won't be any question about what was said, isn't it a fact that when she asked you how it happened that you were contending that Dave Cascaden owed you money, did you not tell her at that time that you and Petree had purchased the Tanana Bottling Works from Ahlberg for nine thousand dollars?

A. Yes.

Q. That you and Petree had paid three thousand dollars, that three thousand dollars was paid by the note given to the Farmers Bank, which Dave Cascaden afterwards paid—

A. (Interrupting.) Yes.

Q. (Continuing.)—and that there was three thousand still [45] due? A. Yes.

Q. That in 1918, on February 6th, the note for two thousand dollars was given to you when you were going outside for protection in the event that you were compelled to pay Ahlberg the other three thousand dollars that you had given a note for?

A. Not in the same words, no.

Q. Well, wasn't it that meaning, didn't you convey that meaning to her?

A. No, I said I could have had protection if I had asked for it perhaps at that time.

Q. If you had asked for it? Why were you speaking about needing protection?

A. Well, I told Mrs. Cascaden there was still

(Testimony of George Weber.)

three thousand dollars to be paid, and the firm took that debt over and put it on the books, but they never issued any security for it, and it is up to me to pay that. The way we started to talk about it at that time, Mrs. Cascaden came across to my gate and said, "You know, Mr. Weber, Mr. Cascaden wanted me to deed your interest back to you after it is all settled and sold"—

Q. (Interrupting.) Yes.

A. (Continuing.)—and I said, "I couldn't compel you to and I wouldn't do it unless you want to do it yourself."

Q. Didn't she at that time ask you why you were claiming that Dave Cascaden owed you any money when, as a matter of fact, Dave Cascaden had been putting up money for the brewery, for the bottling works, and did you not, in response to her question, say to her that Dave Cascaden [46] didn't owe you anything, that it was Dave Petree that owed you the money? A. It was Petree's note, yes.

Q. Yes. Did she not ask you how it happened that that note was given, this two thousand dollar note was given, and did you not at that time tell her it was given you for protection against the Ahlberg claim?

A. I don't think I recollect that, not the same words. I say I could have had protection if I had asked for it some time, but the note is up to me to be paid now.

Q. But you can't say now how it happened that

(Testimony of George Weber.)

you and Petree figured out that he owed you two thousand dollars?

A. I didn't keep any track of my accounts. I had my head full of changing the business from one to the other, and I had full confidence in Mr. Petree and Mr. Cascaden personally and financially. That time I didn't know how Mr. Petree stood.

Q. And Mr. Petree had enough confidence, did he, in letting you just take the figures out of your head and saying "You owe me two thousand dollars," and he gave you that note?

A. It was Mr. Petree's, not mine.

Q. Mr. Petree gave you the note? A. Yes.

Q. And did you have any papers or figures there to figure out how much he owed you?

A. I don't recollect that.

Q. And he just gave you a note? A. Yes.

Q. Now Mr. Cascaden didn't owe any part of that note, did he? [47]

A. Not before he signed it, no.

Q. And you didn't ask Mr. Petree for Mr. Cascaden's signature? A. I don't recollect that.

Q. You didn't ask Mr. Petree for any security for that note?

A. No, because I thought it would be settled when they reorganized.

Q. So Mr. Petree handed you, you say, a note for two thousand dollars? A. Yes.

Q. And when you looked at the note it had Dave Cascaden's name on it?

A. I don't recollect that. I put the note in the

(Testimony of George Weber.)

bank with my other papers when I left, the day before I left.

Q. You didn't even know that Dave Cascaden's name was on the note? A. I don't recollect that.

Q. He didn't owe you any money, Dave Cascaden didn't owe you any money at that time, did he?

A. Not before he signed the note, no.

Q. And then afterwards you borrowed five hundred dollars from him in June? A. Yes, sir.

Q. And you gave him a note at that time?

A. Yes.

Q. Mr. Cascaden continued to advance money to the Beverage Company afterwards, didn't he?

A. Yes.

Q. Now, Mr. Weber, you stated in your direct examination that this \$3,033.00 that Mr. Cascaden paid to the bank, [48] that you gave him a mortgage for that? A. Yes.

Q. That was a second mortgage on the Beverage Company property, wasn't it? A. I believe so.

Q. Why was that made a second mortgage?

A. Because Mr. Cascaden held a mortgage on the brewery property as first mortgage, and the bottling works was a second mortgage.

Q. Isn't it a fact that he had no mortgage on any property of the Beverage Company up until that time?

A. That is more than I could tell, Mr. Clark.

Q. Isn't it a fact that both of those, the first and the second mortgage were made out the same day?

A. That may be, but Mr. Cascaden had that

(Testimony of George Weber.)

money coming for money advanced to the brewery before.

Q. Is it not a fact, Mr. Weber, that Mr. Cascaden, on that day, the day that those two mortgages were executed, advanced five thousand dollars to the Beverage Company? A. That may be correct.

Q. Yes. And Mr. Cascaden had already paid this three thousand dollar note to the bank, he had already paid the Farmers Bank three thousand dollars, hadn't he?

A. Well, I couldn't tell exactly the dates, Mr. Clark, when the things were made out.

Q. Isn't it a fact that at your meeting on the 25th day of June, 1918, that Mr. Cascaden agreed to advance five thousand dollars to pay some outstanding claims? A. Yes.

Q. And two mortgages were given, one to him for five [49] thousand dollars? A. Yes.

Q. And a second mortgage—

A. (Interrupting.) Yes.

Q. (Continuing.) —for \$3033.00? A. Yes.

Q. Yes. Did you ever ask Mr. Cascaden to surrender that note that he paid at the bank, that \$3033.00 note?

A. I did not. It was Mr. Petree's doings at the time.

Q. He never was asked to surrender that note?

A. I spoke to Mr. Petree about it, if he would ask Mr. Cascaden to do that, that's all.

Q. Isn't it a fact that that mortgage, that second

(Testimony of George Weber.)

mortgage, was simply given to Mr. Cascaden as security for that note?

Mr. ROTH.—We object to that, if the Court please, on the ground that the same is incompetent, irrelevant and immaterial and not the best evidence. The mortgage itself speaks for itself.

The COURT.—Overruled.

Q. Isn't it a fact that that second mortgage was given to Mr. Cascaden as additional security for the promissory note that he had paid at the Farmers Bank?

A. Well, it was given for that promissory note that he had paid to the Farmers Bank, yes.

Q. He never gave you any writing in which he said that he would release you from any liability on that note, did he?

A. Well, it was the firm's dealings, Mr. Clark, not individually. We had organized by that time.
[50]

Q. When that note was given you hadn't organized, had you?

A. We organized on the 27th of April.

Q. Yes, and that note was given in the previous October?

A. That was Mr. Petree's and my own note, yes.

Q. Yes. Well, you never got any writing from Mr. Cascaden in which he said that he would accept the Beverage Company and release you and Petree from this note that he had paid at the Farmers Bank, did you?

(Testimony of George Weber.)

A. Not to my knowledge, and I thought it wouldn't be necessary.

Q. You never asked him for anything of that kind, did you?

A. No. Mr. Stevens did all that legal work at that time.

Q. Now, you know, of course, that Mr. Cascaden is in the asylum outside?

A. Yes. I am sorry for it.

Q. And you know that you are the only member of that Beverage Company that is here that knows anything about the transactions? A. Yes.

Q. Mr. Cascaden secured his interest in the Beverage Company by a transfer of stock from Dave Petree, didn't he?

A. I believe so; I am not sure.

Q. Just to refresh your memory, is it not a fact that Mr. Cascaden advanced considerable money for Mr. Petree in connection with the brewing company? A. Yes.

Q. And that Mr. Petree owed him over ten thousand dollars?

A. I don't know the amount, but it must have been that amount, something like that.

Q. Isn't it a fact that after the Beverage Company was [51] organized that Mr. Petree assigned some of his stock in the Beverage Company to Dave Cascaden in part payment of what he owed him on the old brewery company account?

A. Well, I know—as far as I know for what purpose I could not tell. It was between the two.

(Testimony of George Weber.)

Q. The original purchase of the Tanana Bottling Works and the original purchase of your other plant up here that you had, that was made by you and Petree together?

A. The original purchase of the bottling works, yes.

Q. And you and Petree then organized a corporation, and Mr. Cascaden's interest in that corporation you state was a one-fifth, I believe?

A. I believe so, yes.

Q. And he got that through Mr. Petree?

A. He got that through his interest in the brewery.

Q. And he was not supposed to put up any money into the Beverage Company? A. No.

Mr. CLARK.—That is all.

Redirect Examination.

(By Mr. ROTH.)

Q. But that note for three thousand dollars that was signed by you and Petree to the Farmers Bank was afterwards, after it became due, signed by Cascaden?

A. It must have been, because it wasn't signed before on the original.

Q. Now, the note that you gave to Cascaden for \$3033.00, what was that note for?

Mr. CLARK.—We object as already having been gone [52] into on direct examination.

The COURT.—He may answer the question.

A. Mr. Cascaden took up the first original note

(Testimony of George Weber.)

in the bank, and we took then the second note from the firm and the mortgage also.

Q. What for? A. For the first note.

Q. For the first note? A. Yes.

Q. And that \$3033.00 note that he took is the same note that was sued upon in this court and has gone to judgment?

A. Yes, sir. There was only one \$3033.00 note all the way through, not two, only one, and that went on record here to show that.

Q. And Cascaden has already a judgment for that note? A. So I understand.

Q. In this court? A. So I understand.

Q. Not only for the note but for interest and attorney's fees, too? A. Yes.

Q. And this note here that they sue on is for the exact amount that they have got judgment for now?

A. Yes, exactly, and I believe it is the same number, too, if I am right.

Mr. ROTH.—Yes, it is the same number. That is all. [53]

Recross-examination.

(By Mr. CLARK.)

Q. Mr. Weber, you also know, do you not, that that judgment that was secured against the Beverage Company on a three thousand dollar note wasn't paid? You know that has never been paid, don't you?

A. Well, it is paid, I understand, when it was foreclosed and sold.

(Testimony of George Weber.)

Q. Don't you know it didn't sell for enough to wipe out the first mortgage?

Mr. ROTH.—That is objected to, if the Court please, on the ground the same is incompetent, irrelevant and immaterial.

Mr. CLARK.—You have introduced the record yourself that shows all that.

A. It may be.

Mr. ROTH.—That is all right. I object to it on the ground it is incompetent, irrelevant and immaterial.

The COURT.—Is it on the records?

Mr. CLARK.—It is on the records.

The COURT.—Objection overruled.

A. That may be, Mr. Clark. I wasn't much of a lawyer. The record will show.

Mr. CLARK.—The record will show the judgment and the execution and the return of the execution.

Mr. ROTH.—That is all right.

Mr. CLARK.—That is all.

(Witness excused.) [54]

Testimony of M. R. Boyd, for Defendant.

M. R. BOYD, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. ROTH.)

Q. What is your name? A. M. R. Boyd.

Q. What official position do you occupy?

(Testimony of M. R. Boyd.)

A. Commissioner; United States Commissioner and *ex officio* Recorder.

Q. Fairbanks Precinct?

A. Fairbanks Precinct, Fourth Division.

Q. As such have you the recording records in your possession? A. Yes, sir.

Q. Have you Volume 8 of Real Mortgages here with you in the courtroom? A. I have, yes.

Q. Turn to page 473 of that volume and state if there is a mortgage recorded from George Weber and David Petree to the Farmers Bank?

A. Yes, sir; Number 5041, recorded November 1st, 1917.

Q. And is there any record there that shows it was released or paid?

A. Yes, sir.

Q. What is that?

A. There is a marginal release.

Q. What is the marginal release?

A. "The within mortgage is hereby acknowledged paid in full and discharged this 25th day of June, 1918. Farmers Bank, by H. E. St. George, President. Witness, [55] J. V. Creamer, Deputy Recorder."

Mr. ROTH.—If the Court please, I ask to have this mortgage introduced in evidence, read into the record, so that the Recorder may return the book.

Mr. CLARK.—Why not simply dictate a synopsis of what it is. If it is just the fact you want the mortgage, show the mortgage was recorded and the

(Testimony of M. R. Boyd.)

note was signed by Weber and Petree, and you wouldn't have to encumber the record.

Mr. ROTH.—Well, I want to show this is exactly the same note with two names on it that we have here.

Mr. CLARK.—Well, maybe we can stipulate to that. Let's compare the note and see if it is the same thing. There seems to be two differences. Now "George" is spelled out in full there and it is abbreviated here, and in the original here "October" is written out in full and it is abbreviated here. Now would a thing of that kind get by in the Recorder's office without being checked, do you suppose?

The WITNESS.—Well, I didn't know the recorder nor his deputy. I couldn't say.

Mr. ROTH.—The same number, A-22.

Mr. CLARK.—Yes. Well, I will stipulate the wording is the same, with the exception that "George" is spelled out in full and "October" is spelled out in full, while in the note it is abbreviated.

Mr. ROTH.—Do you stipulate it as the same note?

Mr. CLARK.—The wording is precisely the same with those two exceptions. Of course, I don't know. [56]

The COURT.—The payments on the back are the same.

Mr. CLARK.—That is the note we have introduced in evidence, if the Court please. The only

(Testimony of M. R. Boyd.)

question that I had in my mind is whether that was the same note referred to in this other mortgage given to the Farmers Bank on that same date. I presume it is, although evidently the comparison was a little bit off because there were abbreviations that were omitted. You see, that was in another mortgage.

Mr. ROTH.—I don't want any question left but what this is the same note, if the Court please. The only difference is that "D. H. Cascaden" is written on there as a maker, and I want to show, of course, the number is the same, the date is the same, the date of payment is the same. That is the only thing I am interested in. Of course, I don't want to encumber the record, but I don't want to leave any question on the proposition at all but that this very note that they have sued on in this action was for the exact amount, the same indebtedness that they already have sued and recovered a judgment on. That is the point. I don't want any question about that, and for that reason I want to introduce the record here.

The COURT.—You may introduce it. Nobody has made any objection to it, except Mr. Clark suggested he wanted to shorten it.

Mr. ROTH.—I did, too, and if he would stipulate that was the same note that would end it, but he [57] doesn't want to stipulate that.

Mr. CLARK.—Well, I don't know. It seems the wording is the same with the exception of those

(Testimony of M. R. Boyd.)

two differences. Reading the record won't help to clear up that point at all.

Mr. ROTH.—Well, I will ask the witness to just simply read the note.

Q. Is there a note in that mortgage that you have referred to as having been recorded of that date?

A. Yes, sir.

Q. Just please read that note.

A. (Witness reads as follows:)

“3000.00. Fairbanks, Alaska, October 31st, 1917.

Six months after date, without grace, for value received, I promise to pay to the order of the Farmers Bank of Fairbanks, at their office in Fairbanks, Alaska, the sum of Three Thousand Dollars, with interest thereon at the rate of one per cent from date hereof until paid; both principal and interest payable in lawful money of the United States—.”

Q. (Interrupting.) You say one per cent. Doesn't it say “one per cent per month”?

A. (Continuing.)—“One per cent per month from date hereof until paid; both principal and interest payable in lawful money of the United States. Interest to be paid monthly and if not so paid the whole sum of both principal and interest shall become immediately due and collectable at the option of the holder of this note. In the event suit is brought to collect this note, or any portion thereof, I promise to pay in addition to the [58] costs and disbursements provided by statute a reasonable

(Testimony of M. R. Boyd.)

amount for attorney's fee. For value received each and every party signing this note, either as endorser, surety, guarantor or assignor, waives presentment, demand, protest, notice of nonpayment thereof, and binds himself thereon as a principal.

No. A-22.

Due April 30th, 1918.

(Signed) GEORGE WEBER,
DAVID PETREE."

Mr. ROTH.—That is all.

Cross-examination.

(By Mr. Clark.)

Q. Mr. Boyd, in this original note which I show you it says "Three Thousand & no/100." Is there anything of that kind in that note copied in the mortgage?

A. (Reading) "at their office in Fairbanks, Alaska, the sum of Three Thousand Dollars, with interest thereon at the rate of one per cent per month."

Q. There is nothing in there about "& no/100"?

A. No, sir.

Q. This note you have read out of this mortgage, the word "October" is spelled out in full, is it not?

A. Yes, sir.

Q. In this note which I show you, which is Plaintiffs' Exhibit "A," "October" is abbreviated to "Oct.," is it not?

A. Yes, sir.

(Testimony of M. R. Boyd.)

Q. In the note you have just read from the book the signature shows "George Weber," "George" is spelled out in full, is it not?

A. Yes, sir. [59]

Q. In the note which I show you "George" is abbreviated?

A. "G-e-o."

Q. Yes. Now, is it not a fact, Mr. Boyd, there are three discrepancies between the note as copied into the record here that you are reading from and this note that we are referring to, the first discrepancy in the "October," the abbreviation of "October" is not set forth, that the words "& no/100" is omitted, and George Weber's name is written out in full instead of being abbreviated?

A. Yes, sir.

Q. Those records are always compared, are they not?

A. Yes; should be. That is my practice now, to always compare them.

Q. There is nothing on here to show that it was compared, is there?

A. Possibly that checkmark (indicating) would indicate that it had been compared. In comparing, though, now, in reading "October" that would be something that might get away; so of the "George."

Q. Would that "& no/100" get away?

A. An error of that kind should not get away, but it would be very easy for the other to get away, but "& no/100" should not get away.

Mr. CLARK.—That is all.

(Testimony of M. R. Boyd.)

Redirect Examination.

(By Mr. ROTH.)

Q. But from a comparison of the note here, in all other respects with that, it is perfectly apparent, is it not, it was careless comparison. [60]

Mr. CLARK.—We object, if the Court please. It is not for this Recorder to say it is careless comparison. It is a question of fact for the jury as to whether or not it is the same note.

Mr. ROTH.—I will withdraw that question.

Q. You don't mean to say, Mr. Boyd, there are not errors in copying instruments that are not discovered in comparing them afterwards?

Mr. CLARK.—Object, as that is too broad and theoretical, and asking him about somebody before he was in office.

The COURT.—Well, he may answer.

A. Well, I will say this, now. In comparing, for instance, the recorder is reading her work here and you are holding copy on her. Now, if she read "George Weber" you might overlook calling her attention to the fact it was "Geo" Weber. Now, it should be read "G-e-o. Weber," but we all know George Weber, and if it was read "George Weber" to you, you might let it go by. She might have "George Weber" here and you have "G-e-o. Weber" and that get by. That same thing would hold true with "October." The correct reading of "October" would be "O-c-t.," but if she read it "October" it would go at "October," you see.

(Testimony of M. R. Boyd.)

Q. But sometimes people just simply make a mistake in reading, don't they?

A. Oh, I suppose they do, yes. I don't imagine that anyone is perfect.

Mr. ROTH.—That is all.

Mr. CLARK.—That is all, Mr. Boyd.

(Witness excused.) [61]

Mr. CLARK.—May I recall Mr. Weber for a little bit more cross-examination?

Mr. ROTH.—All right.

Testimony of George Weber, for Plaintiffs (Recalled).

GEORGE WEBER, the defendant, recalled by plaintiffs for further cross-examination, further testified as follows:

Cross-examination (Resumed).

(By Mr. CLARK.)

Q. Mr. Weber, where did you and Mr. Petree get the money that you made your first payment to the Tanana Bottling Works with?

A. I had some and I borrowed some.

Q. Isn't it possible you and Mr. Petree borrowed it from the Farmers Bank?

A. No, the record would show there. I did not.

Mr. CLARK.—That is all.

(Witness excused.)

Testimony of Chas. L. Thompson, for Defendant.

CHAS. L. THOMPSON, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. ROTH.)

Q. Were you acquainted with David Petree during his life time? [62] A. I was.

Q. Do you remember when David Petree left here the last time? A. I do.

Q. I will ask you whether or not he left any business with you to take care of when he left?

A. Yes, he left some orders for collection on different people in the amount of approximately \$500.00.

Q. And what did he direct you to do with the proceeds?

A. Pay the money to Weber, George Weber.

Q. Did he say anything further in connection with that?

Mr. CLARK.—Oh, we submit, if the Court please, this is hearsay and not binding upon the plaintiffs in this action. We can't vouch for anything Mr. Petree may have told Mr. Thompson. It is not competent evidence.

The COURT.—Overruled.

Q. Just state what he said, everything that he said as you recollect in that regard.

A. He told me if I collected this money to pay it to George Weber, as he owed him some money.

(Testimony of E. H. Mack.)

Mr. ROTH.—You may cross-examine.

Mr. CLARK.—No examination.

(Witness excused.) [63]

Testimony of E. H. Mack, for Defendant.

E. H. MACK, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. ROTH.)

Q. What is your name? A. E. H. Mack.

Q. Did you ever work for the Farmers Bank?

A. Yes, sir.

Q. I will ask you to state whether or not you have in your possession any of the receipts or documents or anything showing the payments of any bills? A. I have some credit slips, yes, sir.

Q. I will ask you to state whether or not you have a credit slip there with reference to an indebtedness that was owing the bank, Farmers Bank, by David Petree and George Weber?

A. I have a credit slip with the loan number, the note number, but I don't know what it is.

Q. Have you a note slip? A. Yes, sir.

Q. With reference to No. A-22? A. I have.

Q. May I see it, please? (Witness produces papers.) How do you come to have this in your possession?

A. They were in the office, but they were not taken away.

(Testimony of E. H. Mack.)

Q. Will you detach that one, please? (Witness detaches a paper from a bunch of papers.)

Mr. CLARK.—That is St. George's writing all right.

Mr. ROTH.—We desire to introduce this in evidence. [64]

Mr. CLARK.—No objection.

Note slip referred to received in evidence marked Defendant's Exhibit 6 and made a part of the record herein.

(Defendant's Exhibit 6 read to the jury.)

Q. How long did you work in that bank, Mr. Mack? A. About two years.

Q. What capacity? A. Accountant.

Q. Did they number their notes?

A. They did.

Q. And this was a regular number of the bank?

A. Yes, sir.

Mr. ROTH.—You may cross-examine.

Mr. CLARK.—No examination.

(Witness excused.)

Testimony of George Weber, in His Own Behalf (Recalled).

GEORGE WEBER, the defendant, recalled as a witness on his own behalf, further testified as follows:

Direct Examination.

(By Mr. ROTH.)

Q. What position did you occupy, what office

(Testimony of George Weber.)

did you hold, if any, in the Fairbanks Beverage Company? A. Secretary, and treasurer also.

Q. As such have you the books in your possession of the Beverage Company? [65] A. I have.

Q. I will ask you to turn to the minutes of June 25, 1918, and state whether or not there is any entry there with reference to that note that you and Mr. Petree had given to the Farmers Bank for the sum of three thousand dollars? A. Yes, sir.

Q. Who was present at that meeting?

A. David Petree, David H. Cascaden and George Weber.

Q. What office did David Petree hold in the company? A. He was president.

Q. What office did David H. Cascaden hold?

A. Vice-president.

Q. And Mr. Cascaden was present, was he?

A. Yes, he was present.

Q. Was there a resolution introduced at that time? A. Yes, sir.

Q. And was it adopted? A. Yes, sir.

Q. Who voted for the resolution?

A. The three aforesaid names, partners.

Q. David H. Cascaden? A. Yes, sir.

Q. David Petree? A. Yes, sir.

Q. And yourself? A. Yes, sir.

Q. Was that resolution typewritten?

A. Yes, sir.

Q. Was it signed? A. Yes, sir. [66]

Q. Who prepared this resolution?

A. I believe Mr. Stevens.

(Testimony of George Weber.)

Q. Morton E. Stevens? A. Yes, sir.

Q. Attorney at law? A. Yes, sir.

Q. Is this the original resolution? (Indicating)

A. Yes, sir.

Mr. ROTH.—I offer this in evidence, if the Court please.

Mr. CLARK.—We object, if the Court please, as it is not a resolution at all, simply purports to be the minutes of the Board of Directors of that day.

Mr. ROTH.—Then we will call it minutes.

Q. They are signed by David H. Cascaden, David Petree and yourself? A. Yes, sir.

Mr. ROTH.—And it refers to the identical matter in controversy here, if the Court please, and we ask to introduce this in evidence.

Mr. CLARK.—If they call it “minutes” we don’t object.

The COURT.—Very well, it may be admitted.

Minutes referred to received in evidence, marked Defendant’s Exhibit 7 and made a part of the record herein.

Mr. ROTH.—That is all.

Mr. CLARK.—That is all.

(Witness excused.)

Mr. ROTH.—Defendant rests.

(Defendant rests his case.) [67]

**Testimony of Blanche Cascaden, for Plaintiffs
(Recalled in Rebuttal).**

BLANCHE CASCADEN, recalled in rebuttal as a witness on behalf of the Plaintiffs, further testified as follows:

Direct Examination.

(By Mr. CLARK.)

Q. Mrs. Cascaden, did you have a conversation with Mr. Weber some time last spring at the gate of the Heilig residence, where you were then living?

A. Yes, sir.

Q. And was it after a suit that he had brought involving certain syrups and other things up there had been settled?

A. Yes, sir; right after I released them.

Q. Who was present at the meeting, if you remember, just yourself and—

A. (Interrupting.) Just myself and Mr. Weber. The children were there at the door, but not near.

Q. What, if anything, did you ask Mr. Weber at that time in regard to any indebtedness that he claimed to be due from Dave Cascaden?

A. What was the first part of that?

Q. What question did you ask of him?

A. Oh, I asked Mr. Weber how it came that Dave owed him money, and he says, "Well, Dave didn't owe me"—he says, "He don't owe me anything." "Well," I says, "you are suing him for some money." "Well," he said, "that is"—"well," he says, "Dave don't owe me anything," he says

(Testimony of Blanche Cascaden.)

"That is something to do with Petree," he says. "We promised to pay"—I think he said Ahlberg, they owed him something like three thousand dollars and [68] something, and he said, "We agreed to pay that." He says, "The firm has nothing to show for that, but," he said, "we don't—Dave doesn't owe me anything, but," he says, "I have agreed to pay that, and," he says, "it is Petree's note." That's about the words he said. I think I wrote it down, Mr. Clark, and gave it to you right after.

Q. How long after you had this conversation did you write it down?

A. About five minutes from the time he left. I went in the house and wrote it down so I wouldn't forget it.

Q. Had you, at my request, seen him to endeavor to find out what the basis of his claim was?

A. No, sir. No, at your request, Mr. Clark, exactly.

Q. Well, I had discussed with you before that how it came about Dave was on any note to Weber?

A. Yes, you asked me that.

Q. Was it after that you had this talk with him?

A. Yes, sir.

Q. And then you made a memorandum of this conversation?

A. Yes, and I brought it right up to your office.

Q. I will ask you to look at that memorandum, and ask you if that is the memorandum that you

(Testimony of Blanche Cascaden.)

made a few minutes after your talk with Mr. Weber? A. Yes, sir.

Q. What does that say?

A. Well, I have "Three thousand, Weber and Pe-tree; three thousand paid afterwards Dave Cascaden; three thousand still due Ahlberg. Two thousand was to secure George in 1918, February 6th, when he left for outside, against balance of three thousand note due Ahlberg. Firm was to [69] pay Ahlberg three thousand, but has nothing to show."

Q. Directing your attention to this part of the memorandum that says "two thousand was to secure George in 1918, February 6th, when left for the outside against balance of three thousand dollar note due Ahlberg." Did Mr. Weber make that statement to you at that time?

A. He did, Mr. Clark.

Q. And you were referring to that two thousand dollar note that he has set up in his answer in this case? A. Yes, sir; that is the note.

Mr. CLARK.—We ask to introduce this memorandum in evidence.

Mr. ROTH.—We object to the introduction of that in evidence.

Mr. CLARK.—Well, all right. It doesn't make any difference. We withdraw it. That is all.

Cross-examination.

(By Mr. ROTH.)

Q. Did he tell you at that time that David H.

(Testimony of Blanche Cascaden.)

Cascaden had signed this Ahlberg note, or was on this Ahlberg note? A. No, he did not.

Q. Did he explain to you how it came about that David H. Cascaden signed a note to secure him against loss on a note that he was not responsible on at all?

A. That who wasn't responsible on, Mr. Roth?

Q. Did I understand that David H. Cascaden signed that Ahlberg note?

A. No, sir, I didn't know anything about that at all.

Q. Well, you mean to say that George Weber told you at that [70] time that David H. Cascaden signed a note to secure him against loss on the Ahlberg note?

A. I didn't understand Mr. Weber to say that at all. He said that Dave did not owe him anything, but that he had this note against Petree, was to secure him on the loss of Ahlberg, on the balance of three thousand that was due Ahlberg.

Q. Did he explain to you how David H. Cascaden happened to sign that two-thousand dollar note?

A. Well, just as I say there in my memorandum.

Q. He made no other explanation at all?

A. Not that I know of, only what I wrote down there.

Q. Well, did you understand from what he said that Cascaden was responsible on that Ahlberg note? A. No.

Q. You didn't understand it?

(Testimony of Blanche Cascaden.)

A. No, sir. Because I asked Mr. Weber how it come that Dave owed him or Mr. Petree any money. I knew that Mr. Petree and Weber owed in the neighborhood of twenty thousand dollars, and I couldn't see how he come to owe them anything.

Q. Well, you say Petree and Dave. It was the Beverage Company that owed him?

A. I said Mr. Weber and Mr. Petree owed Mr. Cascaden in the neighborhood of twenty thousand dollars.

Q. How do you figure that out?

A. That is very easy. Mr. Petree owed him alone pretty near nine thousand dollars, and the balance was owed by the beverage and the brewery company, covered by a mortgage, part of it, and then there is two thousand that isn't [71] covered at all, that is still due.

Q. Yes, but it was the beverage or brewing company that owed him?

A. Well, I said Mr. Weber and Mr. Petree owed him in the neighborhood of twenty thousand dollars.

Q. How do you say now that Mr. Weber owed him anything? It was the company that owed him, wasn't it?

A. Well, it was between the two of them, was it not?

Q. Well, it was the corporation that owed him, wasn't it?

A. It is the corporation that is suing him, I guess.

Q. You are saying now that George Weber and

(Testimony of Blanche Cascaden.)

Petree owed him in the neighborhood of twenty thousand dollars?

A. Yes, sir; I do, and still say so.

Q. And you still say so?

A. Yes, sir; except this that has been settled through a mortgage.

Q. Does he owe him anything except through the corporations that he was a member of?

A. Well, I cannot say—I don't know just exactly that. I know the five hundred dollars that Mr. Weber borrowed from Dave didn't seem to have anything to do with the corporation, and the eight thousand and some odd dollars that Mr. Petree had that Dave paid notes for didn't have anything to do with the corporation.

Q. What has George Weber got to do with that?

A. You are just asking me about—

Q. (Interrupting.) You volunteered a statement now. I don't understand it. Where does George Weber personally, outside of this five hundred dollar note, owe David H. Cascaden anything? Now, you made the statement here under [72] oath. Now explain to me—that's all I want to know—where he owes it?

A. Well, I imagine that Mr. Weber and Mr. Petree were part of the corporation. I don't know where else—who else you could blame for it.

Q. Well, Cascaden was—

A. (Interrupting.) He was putting up the money.

Q. He was a member of the corporation?

A. Yes, and he was putting up the money, too.

(Testimony of Blanche Cascaden.)

Q. How much of an interest in the corporation did he have? A. I don't know.

Q. Then Dave Cascaden owed it, too, according to the—

A. (Interrupting.) He owed an interest, yes, sir.

Q. He owed his—the way you are reasoning the thing out, he also owed this same indebtedness. If the corporation owed him and he is a member of the corporation, why, then he also owed it, didn't he?

A. Well, part of it was owed before he became a member of the corporation.

Q. Well, that may be true, but what I want to get at is this: Outside of this five hundred dollar note there is nothing personal that George Weber owed David H. Cascaden that you know of, outside of the corporation?

A. Nothing, unless it is the three thousand dollar note we are just bringing suit for signed by Mr. Weber and Mr. Petree.

Q. Now, while you mention that I want to get at this three thousand dollar note. You swore to this complaint? A. Yes, sir.

Q. Now, you allege here, in paragraph 3, "That on or about the [73] 31st day of October, 1917, defendant," that is, George Weber, "above named borrowed from the Farmers Bank of Fairbanks the sum of three thousand dollars, and plaintiff David H. Cascaden and David Petree signed a note then and there given by said George Weber

(Testimony of Blanche Cascaden.)

to the Farmers Bank of Fairbanks as joint makers with the defendant above named, but said money was for the sole use and benefit of the defendant above named." Now, you swore to that complaint. Now, where do you get those facts about this three thousand dollars being borrowed for the sole use and benefit of George Weber, where do you get that?

A. Well, I think Mr. Clark can answer that as well as I can.

Q. Now, you swore to this complaint. Now tell me where you got that?

A. Well, I asked Mr. Weber once myself what he used the three thousand dollars for, and he said, "Oh, for the brewery and different things, for different purposes."

Q. If he did it for the brewery then he didn't do it for himself personally?

A. Well, he said different purposes, too, you know.

Q. But you swear in this complaint he borrowed that for his own use and that Petree went on his note as security to him. Where did you get that, that Petree went on that note as security for a personal loan of George Weber's?

Mr. CLARK.—She just told you he told her at one time that he borrowed the money.

Mr. ROTH.—That he had borrowed the money for himself.

Q. Did you say George Weber ever told you he borrowed that money for himself personally? [74]

(Testimony of Blanche Cascaden.)

A Not personally for himself, but I said, "What did you do with that money, what did you use it for?" and he said, "Oh, for the brewery and other purposes." Those are the very words he used.

Q. And on that you swear positively that he said he borrowed it for his own personal benefit and that Dave Petree went on that note to secure that personal payment of his? On that statement, now, you made this oath, eh, with no other information at all, isn't that correct?

A. Well, I don't know just exactly how you have it put there.

Q. Here is the way it is put; here is the way you put it—I am not putting it at all: "That on or about the 31st day of October, 1917, defendant above named"—that is George Weber—"borrowed from the Farmers Bank of Fairbanks the sum of three thousand dollars, and plaintiff David H. Cascaden and David Petree signed a note then and there given by said George Weber to the Farmers Bank of Alaska as joint makers with the defendant above named, but said money was for the sole use and benefit of the defendant above named," who was George Weber.

A. Well, chances are it were, because he told me himself he used it for the brewery and for other purposes, to pay bills and things for himself. I suppose he didn't have the money and that is what he used it for. I asked the man what he used it for.

Q. Did he say he used it for himself?

(Testimony of Blanche Cascaden.)

A. He said part of it for the brewery and for other purposes.

Q. Did he say for other purposes for himself personally? A. He didn't add that, no. [75]

Q. But you added that in here?

Mr. CLARK.—Oh, now, if the Court please, that is just simply quibbling. If it is for his own use and benefit—

Mr. ROTH. (Interrupting.) I think that I have an answer fully and complete.

Q. Did you know at the time that you swore to this complaint that you had already brought a suit to foreclose a note for the identical same amount?

A. No, sir.

Q. You didn't know it at the time?

A. No, sir. I don't know it yet either.

Q. How is that? A. I don't think so yet.

Q. You don't think so yet? A. No, sir.

Q. If you had known it you wouldn't have brought this suit? A. No, sir.

Mr. CLARK.—We object to that, if the Court please. That is irrelevant, immaterial and incompetent. Our contention is if this mortgage that was given, the second mortgage that was given, if it was given for anything it was additional security in addition to that note.

Mr. ROTH.—I am cross-examining this witness, if the Court please, to find out—

Mr. CLARK. (Interrupting.) Well, you know well enough the attorneys prepare these things ac-

(Testimony of Blanche Cascaden.)

cording to the legal status of the affair, and that the client, if she believes it to be true, [76] signs it.

Mr. ROTH.—Well, I am not in the habit of preparing a complaint and asking my client to sign and swear to it.

The COURT.—The objection will be overruled.

Q. Where did you get this note that you sued on, this three thousand dollar note?

A. In Mr. Cascaden's safe deposit box.

Q. Where did you get the other note that you sued the Fairbanks Beverage Company on for \$3,033.00?

A. All those notes were in Mr. Cascaden's box in the bank, in the First National; all the notes that we have were in that box.

Q. Weren't also a lot of the Beverage Company's notes in that box, too?

A. Well, those that the Beverage Company had given Mr. Cascaden, yes, but nothing belonging to the Beverage Company.

Q. Did you get possession of the papers of the Beverage Company?

A. How do you mean? What papers?

Q. You got a safe, didn't you? A. Yes, sir.

Q. And in that safe David Petree had papers, didn't he? A. They are still there, I guess.

Q. And in those papers of David Petree's, you found this three thousand dollar note, did you not, that three thousand dollar note that you are suing on here? That is where you got that note, wasn't it?

(Testimony of Blanche Cascaden.)

A. No, the note I am suing on was in Mr. Cascaden's safe [77] deposit box in the bank, the three thousand dollar note, not in the safe of Dave Petree.

Q. No, I am not talking about the three thousand dollar note, I am talking about—oh yes, I am talking about the three thousand dollar note, that's right.

A. I thought you were.

Q. You say it was in Cascaden's safe deposit box?

A. Yes, sir.

Q. And you don't believe that is the same note?

A. I do not.

Q. Because it has three names on it and the other one had two, wasn't that it?

A. I don't know what the other had. I know what this one had.

Q. Well, you know what the other one had, don't you? Didn't you go and examine the records, that Farmers Bank note, before you brought this suit?

A. No, I didn't examine the records.

Mr. ROTH.—That is all.

Redirect Examination.

(By Mr. CLARK.)

Q. After Mr. Cascaden went outside, was taken outside, you were appointed guardian, were you?

A. Yes, sir.

Mr. ROTH.—That is admitted.

Q. And you attempted then to gather up his papers and effects and to realize on the assets?

A. Yes, sir.

(Testimony of Blanche Cascaden.)

Q. You got his tin box from the bank?

A. Yes. [78]

Q. And went through his papers that were contained therein? A. Yes, sir.

Q. And that is where you found the notes that you have sued on in the various accounts in this court?

A. Yes, sir. They were in care of Mr. Hess.

Mr. CLARK.—That is all.

Recross-examination.

(By Mr. ROTH.)

Q. At the time that you had this conversation—I overlooked that before—at the time that you had this conversation with George Weber up there is it not true that you told him that Dave, referring to your husband David H. Cascaden, had told you that when this mortgage was foreclosed, the matter was settled, that you were to deed back, or assign back his interest to him, but now that he brought this suit you weren't going to do it?

Mr. CLARK.—We object as going into collateral matters. If we go into that matter it will open up a proposition that will take hours to cover, and it had nothing to do with this particular transaction whatever, and we object as it is not cross-examination.

The COURT.—Overruled.

A. Why, I told Mr. Weber, not that time, but—

Q. (Interrupting.) Did you tell him that that I asked you there?

A. Well, no, I didn't tell him at that time, but I

(Testimony of Blanche Cascaden.)

told him a number of times before when he started in the case—

Q. (Interrupting.) Never mind, I am not asking you that. [79]

A. No, I didn't tell him that at that time.

Q. You didn't tell him that at that time?

A. No, I didn't tell him that at that time.

Mr. ROTH.—That is all.

A. (Repeating.) I didn't tell him that at that time.

Mr. CLARK.—That is all, Mrs. Cascaden.

(Witness excused.)

Mr. CLARK.—It is clearly understood that whole record in that other case has been introduced in evidence so it can be referred to?

Mr. ROTH.—Yes.

Mr. CLARK.—I think that is all.

(Plaintiffs rest in rebuttal.)

Mr. ROTH.—Now, if the Court please, as I stated, I have this note in my possession—I haven't it here present—that was given to Ahlberg. George Weber testified that Cascaden did not sign that note. That is the only thing that was pertinent, as I understood it, and for that reason I didn't bring the note here, because there is no evidence to the contrary on the point, and I merely want to explain why, when I stated I had the note in my possession that I haven't it here, because the only one thing that was pertinent at all was that Cascaden didn't sign the note. It is understood that George Weber testified that Cascaden did not sign

that note, that he and Petree signed it, that three thousand dollar note. With that understanding, why, we rest the case. I have [80] the note, and I am stating now that is why I didn't bring it here.

The COURT.—We will take an adjournment at this time, Gentlemen, until 10:00 o'clock Monday morning. At that time the case will be finished.

Whereupon an adjournment was taken until Monday, April 2, 1923, at 10:00 o'clock A. M.

Morning Session.

Monday, April 2, 1923, 10:00 A. M.

Mr. ROTH.—If the Court please, before the argument I desire to renew, for the purpose of the record, the motion for nonsuit that I made at the conclusion of the testimony of the plaintiff.

The COURT.—Very well. The motion may be denied.

Mr. ROTH.—We reserve an exception.

The COURT.—Exception allowed.

Mr. CLARK.—If the Court please, I have a motion I desire to file (handing paper to the Court).

The COURT.—Your motion may be denied, Mr. Clark.

Mr. CLARK.—Note an exception.

The COURT.—Exception allowed.

Mr. CLARK.—Now, if the Court please, I ask leave at this [81] time to file a second amended reply to conform to the proof adduced in this case. It is different from the first amended reply in this particular: In the first amended reply we alleged

that Dave Cascaden, Dave Petree and George Weber purchased the Tanana Bottling Works. The evidence discloses that Dave Cascaden had nothing to do with the purchase of that, and I have amended the reply in that particular. I have also amended in another particular, wherein I allege that the note for three thousand dollars sued on had been given without consideration on the part of either Petree—no, this two thousand dollar note without any consideration upon the part of Petree or of Cascaden. Now the evidence discloses that it was, according to Mr. Webber's testimony, that it was Mr. Petree's obligation, and I desire to file an amended reply eliminating the name of Cascaden from my defense. The Court will realize that Mrs. Cascaden, the plaintiff in this action is under somewhat of a handicap, as Mr. Weber is the only one of the parties that was interested or knew anything about the transaction, and consequently our pleading could not be absolutely accurate, and now I desire to file an amended reply to conform to the proof.

Mr. ROTH.—If the Court please, I don't think that is proper.

Mr. CLARK.—It certainly is permissible.

The COURT.—The court has already prepared its instructions in the case. So far as the Court is concerned the case will be tried on the pleadings as made, and I deny your request to file an amended reply.

Mr. CLARK.—To which we note an exception.

The COURT.—Exception allowed.

(Testimony closed.)

That the exhibits referred to in the foregoing testimony were as follows: [83]

Plaintiffs' Exhibit "A."

\$3,000.00. Fairbanks, Alaska, Oct. 31st, 1917.

Six months after date, without grace, for value received, I promise to pay to the order of the Farmers Bank, of Fairbanks, at their office in Fairbanks, Alaska, the sum of Three Thousand and no/100—Dollars with interest thereon at the rate of One per cent per month from date hereof until paid; both principal and interest payable in lawful money of the United States. Interest to be paid monthly, and if not so paid the whole sum of both principal and interest shall become immediately due and collectable at the option of the holder of this note. In the event suit is brought to collect this note, or any portion thereof, I promise to pay in addition to the costs and disbursements provided by statute, a reasonable amount for attorney's fee. For value received each and every party signing this note, either as endorser, surety, guarantor, or assignor, waives presentment, demand, protest, and notice of non-payment thereof, and binds himself thereon as a principal.

No. A-22.

Due April 30, 1918.

(Signed) GEO. WEBER,
DAVID PETREE,
D. H. CASCADEN.

Endorsements:

Nov. paid \$30. Interest to Nov. 31-17.
Jan. 2, 1918, paid \$30. Interest to Dec. 31-17.
Feb. 1, 1918, paid \$30. Interest to Jan. 31-18.
Apr. 22, 1918, paid \$30. Interest to Feb. 28-1918.
Apr. 22, 1918, paid \$30. Interest to March 31-1918.
May 22, 1918, paid \$60. Interest to May 31-1918.
[Endorsed]: Filed Mar. 31, 1923. Rob't. W.
Taylor, Clerk. [84]

Plaintiff's Exhibit "B."

\$500.00. Fairbanks, Alaska, June 25th, 1918.

Six months after date, without grace, for value received, I promise to pay to the order of David H. Cascaden at Fairbanks, Alaska, the sum of Five Hundred and no/100—Dollars with interest thereon at the rate of One per cent per month from date until paid; both principal and interest payable in lawful money of the United States. Interest to be paid monthly, and if not so paid the whole sum of both principal and interest shall become immediately due and collectable at the option of the holder of this note. In the event suit is brought to collect this note, or any portion thereof, I promise to pay in addition to the costs and disbursements provided by statute, a reasonable amount for attorney's fee. For value received each and every party signing this note, either as endorser, surety, guarantor, or assignor, waives presentment, demand, protest, and notice of non-payment thereof, and binds himself thereon as a principal.

Due Dec. 25/18.

(Signed) GEO. WEBER.

[Endorsed]: Filed Mar. 31, 1923. Rob't W.
Taylor, Clerk. [85]

Defendant's Exhibit No. 1.

[Title of Court and Cause.]

COMPLAINT.

Now comes the plaintiff above-named and complains of the defendant above-named, and for cause of action alleges as follows, to wit:

I.

(1) That, on or about the 26th day of August 1921, David H. Cascaden was, by the Probate Court in and for the Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, duly and regularly adjudged an insane person.

(2) That, thereafter and on or about the 6th day of September, 1921, Blanche Cascaden, plaintiff herein, was, by the United States Commissioner and *ex officio* Probate Judge in and for Fairbanks Precinct, Division and Territory aforesaid, duly and regularly appointed guardian of the estate of the said David H. Cascaden, an insane person; that she thereafter duly and regularly qualified as such guardian in the manner prescribed by law, and thereupon entered on the discharge of her duties as such guardian, and ever since said time has been, and now is, the duly appointed, qualified, and acting guardian of the estate of the hereinabove named insane person.

(3) That the defendant above named is a corporation, incorporated and existing under and by virtue of the laws of the Territory of Alaska. [86]

(4) That, on or about the 3d day of July 1918, the defendant above named, for value received,

made, executed, and delivered to said David H. Cascaden its certain promissory note, which is in the words and figures following, to wit:—

\$4,000.00. Fairbanks, Alaska, July 3d, 1918.

November 1st, 1919, after date, without grace, for value received, I promise to pay to the order of David H. Cascaden, at the First National Bank of Fairbanks, in Fairbanks, Alaska, the sum of Four thousand and no/100 Dollars with interest thereon at the rate of one per cent per month from date hereof until paid; both principal and interest payable in lawful money of the United States. Interest to be paid monthly, and if not so paid the whole sum of both principal and interest shall become immediately due and collectible at the option of the holder of this note. In the event suit is brought to collect this note, or any portion thereof, I promise to pay in addition to the costs and disbursements provided by statute a reasonable amount for attorney's fee. For value received, each and every party signing this note, either as endorser, surety, guarantor, or assignor, waives presentment, demand, protest, and notice of non-payment thereof, and binds himself thereon as a principal.

No. 9407.

Due November 1, 1919.

FAIRBANKS BEVERAGE CO., INC.,

By D. PETREE, Pres.

Attest: GEORGE WEBER,

Sec'y & Treas.

Endorsed:

Pay to the order of First National Bank of Fairbanks, Alaska.

DAVID H. CASCADEN.

Aug. 5 1918 Paid \$40.00 interest to 8/3/18
Sep. 3 1918 Paid \$40.00 interest to 9/3/18
Oct. 3 1918 Paid \$40.00 interest to 10/3/18
Nov. 5 1918 Paid \$40.00 interest to 11/3/18
Dec. 4 1918 Paid \$40.00 interest to 12/3/18
Jan. 3 1919 Paid \$40.00 interest to 1/3/19
Feb. 3 1919 Paid \$40.00 interest to 2/3/19
Mar. 5 1919 Paid \$40.00 interest to 3/3/19
Apr. 2 1919 Paid \$40.00 interest to 4/3/19
May 2 1919 Paid \$40.00 interest to 5/3/19
Jun. 2 1919 Paid \$40.00 interest to 6/3/19
Jul. 7 1919 Paid \$40.00 interest to 7/3/19
Aug 4 1919 Paid \$40.00 interest to 8/3/19
Sep. 4 1919 Paid \$40.00 interest to 9/3/19
Oct. 3 1919 Paid \$40.00 interest to 10/3/19

Pay to the order of D. H. Cascaden without recourse.

FIRST NATIONAL BANK OF FAIR-
BANKS, ALASKA,

By R. C. WOOD,

Pres.

(80¢ Internal Revenue stamps canceled.)

(5) That, at said time and as security for the payment of said note and the note described in the second cause of action herein set forth, the said defendant made, executed, and delivered [87] to said David H. Cascaden a certain real and chattel mortgage, covering and including the following described real and personal property situate in the

Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, to wit:

“Real estate in the Town of Fairbanks, Alaska, and known as Lot 9, in Block 8; Lots 14, 15, and 16, in Block 9; Lot 2 on Block 23; Lot 5, in Block 24; Lot 3, in Block 27; and Lot 7, in Block 28; together with all and singular all buildings, improvements, machinery, appurtenances and hereditaments thereunto belonging or in anywise appertaining.

Also including, among other properties, that certain frame residence building, heretofore known as the Barthel family residence, located on the north side of Front Street, opposite the plant formerly known as the Barthel Brewing plant, in Fairbanks, Alaska, together with all buildings and improvements connected therewith, as well as all of the furniture, fixtures, and furnishings contained therein.

Also including, among other properties, the tanks, buildings, machinery, tools, and appurtenances of every nature whatsoever, belonging to or forming a part of the Fairbanks Beverage Company's plant, as well as the plant heretofore known as the Tanana Bottling Works, in Fairbanks, Alaska;

Also all and singular all stock and supplies of every nature whatsoever and merchandise now owned by, as well as all stock, supplies, and merchandise hereafter acquired by the party of the first part (Fairbanks Beverage Co., Inc.) in the ordinary conduct of their corporate business.”

(6) That, thereafter and on the 6th day of July, 1918, the said mortgage was filed for record in the office of the Recorder of the Fairbanks Precinct aforesaid, and was thereafter recorded in Volume 8 of Real Estate Mortgages, at page 544 thereof, and indexed in Volume 3 of Chattel Mortgage Indexes, as Instrument No. 51537, a true copy of which said mortgage is hereto attached and marked "Plaintiffs' Exhibit "A," and said mortgage is hereby referred to as if included in full in this cause of action.

(7) That no part of said note has been paid, save and except that the interest has been paid on said note up to and including the 3d day of October 1919, and there is now due, owing, and unpaid on said note, the principal sum of \$4000.00, together with interest as described in said note, from the 3d day of October, 1919, at the rate of twelve per centum per annum.

(8) That plaintiff has been compelled to institute and prosecute this action to collect this note, and has become liable [88] to her attorney for a reasonable attorney's fee, and plaintiff is informed and believes and so alleges that the sum of \$750.00 would be a reasonable sum to be allowed to her said attorney for services rendered herein.

(9) That it is the duty of this plaintiff as such guardian to collect and conserve the assets of the estate of said David H. Cascaden, an insane person.

II.

For a second and further cause of action in favor of plaintiff and against defendant herein, plaintiff alleges as follows, to wit:

(1) That, on or about the 26th day of August 1921, David H. Cascaden was, by the Probate Court in and for the Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, duly and regularly adjudged an insane person.

(2) That, thereafter and on or about the 6th day of September 1921, Blanche Cascaden, plaintiff herein, was by the United States Commissioner and *ex officio* Probate Judge in and for Fairbanks Precinct, Division and Territory aforesaid, duly and regularly appointed guardian of the estate of the said David H. Cascaden, an insane person; that she thereafter duly and regularly qualified as such guardian in the manner prescribed by law, and thereupon entered on the discharge of her duties as such guardian, and ever since said time has been, and now is, the duly appointed, qualified, and acting guardian of the estate of the hereinabove-named insane person.

(3) That the defendant above-named is a corporation, incorporated and existing under and by virtue of the laws of the Territory of Alaska.

(4) That, on or about the 3d day of July, 1918, the defendant above-named, for value received, made, executed, and [89] delivered to said David H. Cascaden its certain promissory note, which is in the words and figures following, to wit:

\$1000.00. Fairbanks, Alaska, July 3d, 1918.

November 1st, 1918, after date, without grace, for value received, I promise to pay to the order of David H. Cascaden, at the First National Bank of Fairbanks, in Fairbanks, Alaska, the sum of One thousand and no/100 Dollars, with interest thereon

at the rate of one per cent per month from date hereof until paid; both principal and interest payable in lawful money of the United States. Interest to be paid monthly, and if not so paid, the whole sum of both principal and interest shall become immediately due and collectible at the option of the holder of this note. In the event suit is brought to collect this note, or any portion thereof, I promise to pay in addition to the costs and disbursements provided by statute, a reasonable amount as attorney's fee. For value received, each and every party signing this note, either as endorser, surety, guarantor, or assignor, waives presentment, demand, protest, and notice of non-payment thereof, and binds himself thereon as a principal.

No. 9408.

Due November 1, 1918.

FAIRBANKS BEVERAGE CO., INC.,

By D. Petree,

Pres.

Attest: GEORGE WEBER,

Sec'y & Treas.

[Endorsed:]

Pay to the order of First National Bank of Fairbanks, Alaska.

DAVID H. CASCADEN.

Aug. 5 1918 Paid \$10.00 Interest to 8/3/18

Sep. 3 1918 Paid \$10.00 Interest to 9/3/18

Oct. 3 1918 Paid \$10.00 Interest to 10/3/18

Nov. 5 1918 Paid \$10.00 Interest to 11/3/18

Dec. 4 1918 Paid \$10.00 Interest to 12/3/18

Jan. 3 1919 Paid \$10.00 Interest to 1/3/19

Feb. 3 1919 Paid \$10.00 Interest to 2/3/19

Mar. 5 1919 Paid \$10.00 Interest to 3/3/19
Apr. 2 1919 Paid \$10.00 Interest to 4/3/19
May 1 1919 Paid \$10.00 Interest to 5/3/19
Jun. 2 1919 Paid \$10.00 Interest to 6/3/19
Jul. 7 1919 Paid \$10.00 Interest to 7/3/19
Aug. 4 1919 Paid \$10.00 Interest to 8/3/19
Sep. 4 1919 Paid \$10.00 Interest to 9/3/19
Oct. 3 1919 Paid \$10.00 Interest to 10/3/19

Pay to the order of D. H. Cascaden without recourse.

FIRST NATIONAL BANK OF FAIR-
BANKS, ALASKA,

By R. C. WOOD,
Pres.

(20¢ Internal Revenue stamps canceled.)

(5) That, at said time and as security for the payment of said notes and the note described in the first cause of action herein set forth, the said defendant made, executed, and delivered to said David H. Cascaden a certain real and chattel mortgage, covering and including the following described real and [90] personal property, situate in the Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, to wit:

“Real estate in the Town of Fairbanks, Alaska, and known as Lot 9 in Block 8; Lots 14, 15, and 16, in Block 9; Lot 2 on Block 28; Lot 5, in Block 24; Lot 3, in Block 27; and Lot 7 in Block 28; together with all and singular all buildings, improvements, machinery, appurtenances, and hereditaments thereunto belonging or in anywise appertaining.

Also including, among other properties, that certain frame residence building heretofore known as the Barthel family residence, located on the north side of Front Street, opposite the plant formerly known as the Barthel Brewing Plant, in Fairbanks, Alaska, together with all buildings and improvements connected therewith, as well as all the furniture, fixtures and furnishings contained therein.

Also including, among other properties, the tanks, buildings, machinery, tools, and appurtenances of every nature whatsoever belonging to or forming a part of the Fairbanks Beverage Company's plant, including what was heretofore known as the Barthel Brewing Company's plant, as well as the plant heretofore known as the Tanana Bottling Works, in Fairbanks, Alaska;

Also all and singular all stock and supplies of every nature whatsoever and merchandise now owned by, as well as all stock, supplies, and merchandise hereafter acquired by the party of the first part in the ordinary conduct of their corporate business."

(6) That, thereafter and on the 6th day of July, 1918, the said mortgage was filed for record in the office of the Recorder of the Fairbanks Precinct aforesaid, and was thereafter recorded in Volume 8 of Real Estate Mortgages, at page 544 thereof, and indexed in Volume 3, of Chattel Mortgage Indexes as Instrument No. 51,537, a true copy of which said mortgage is hereto attached and marked

“Plaintiff’s Exhibit A,” and said mortgage is hereby referred to as if included in full in this second cause of action.

(7) That no part of said note has been paid, save and except that interest has been paid thereon up to the 3d day of October, 1919, and there is now due, owing, and unpaid on said note the principal sum of one thousand dollars, together with interest thereon at the rate of twelve per centum per annum from said 3d day of October, 1919.

(8) That plaintiff has been compelled to institute and prosecute this action to collect said note and has become liable to her attorney for a reasonable attorney’s fee, and plaintiff [91] is informed and believes and so alleges that the sum of \$250.00 would be a reasonable sum to be allowed to her said attorney for services rendered herein.

(9) That it is the duty of this plaintiff as such guardian to collect and conserve the assets of the estate of said David H. Cascaden, an insane person.

III.

For a third and further cause of action in favor of plaintiff and against defendant herein, plaintiff alleges as follows, to wit:

(1) That, on or about the 26th day of August, 1921, David H. Cascaden was, by the Probate Court in and for the Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, duly and regularly adjudged an insane person.

(2) That, thereafter and on or about the 6th day of September, 1921, Blanche Cascaden, plaintiff herein, was, by the United States Commissioner

and *ex officio* Probate Judge in and for Fairbanks Precinct, Division and Territory aforesaid, duly and regularly appointed guardian of the estate of the said David H. Cascaden, an insane person; that she thereafter duly and regularly qualified as such guardian in the manner prescribed by law, and thereupon entered on the discharge of her duties as such guardian, and ever since said time has been, and now is, the duly appointed, qualified, and acting guardian of the estate of the hereinabove named insane person.

(3) That the defendant above named is a corporation, incorporated and existing under and by virtue of the laws of the Territory of Alaska.

(4) That, on or about the 3d day of July, 1918, the defendant above named, for value received, made, executed, and delivered to said David H. Cascaden its certain promissory note, which is in the words and figures following, to wit: [92]
\$3033.00. Fairbanks, Alaska, July 3d, 1918.

Two years after date, without grace, we promise to pay to the order of David H. Cascaden Three Thousand and Thirty-three and no/100 Dollars, in gold coin of the United States of America, of the present standard value, with interest thereon in like gold coin, at the rate of one per cent per month from date until paid, for value received. Interest to be paid annually and if not so paid the whole sum of both principal and interest to become immediately due and collectible at the option of the holder of this note. And in case suit or action is instituted to collect this note or any portion thereof,

we promise and agree to pay, in addition to the costs and disbursements provided by statute, a reasonable sum in like gold coin for attorney's fees in said suit or action.

Due July 3d, 1920.

No. —.

FAIRBANKS BEVERAGE CO., INC.,

By D. PETREE,

Pres.

Attest: GEORGE WEBER,

Sec'y and Treas.

[Endorsed]: David H. Cascaden.

(5) That, at said time and as security for the payment of said note, the said defendant made, executed, and delivered to said David H. Cascaden a certain real and chattel mortgage, covering and including the following described real and personal property situate in the Fairbanks Precinct, Fourth Judicial Division, Territory of Alaska, to wit:

“All and singular all real, personal, and mixed property of every nature, kind and description whatsoever, located in Alaska, or elsewhere, owned by the said party of the first part (The Fairbanks Beverage Company, Inc.); including among other properties, the following described real estate, in the town of Fairbanks, and known as Lot 9, in Block 8; Lots 14, 15, and 16, in Block 9; Lot 2, in Block 23; Lot 5, in Block 24; Lot 3, in Block 27; and Lot 7, in Block 28; together with all and singular all buildings, improvements, machineries, ap-

purtenances, and hereditaments thereunto belonging or in anywise appertaining. Also including, among other properties, that certain frame residence building, heretofore known as the Barthel family residence, located on the north side of Front Street, opposite the plant formerly known as the Barthel Brewing plant, in Fairbanks, Alaska, together with all buildings and improvements connected therewith, as well as all the furniture, fixtures, and furnishings contained therein. Also including, among other properties, the tanks, buildings, machinery, tools, and appurtenances of every nature whatsoever, belonging to or forming a part of the Fairbanks Beverage Company's plant, including what was heretofore known as the Barthel Brewing Company's plant, as well as the plant heretofore known as the Tanana Bottling Works, in Fairbanks, Alaska; also all and singular all stock and supplies of every nature whatsoever and merchandise now owned by, as well as all stock, supplies, and merchandise hereafter acquired by the party of the first part in the ordinary conduct of their corporation business, subject, however, to that certain mortgage of this date by the party of the first part herein to the party of the second part herein, to secure two promissory notes aggregating the sum of five thousand dollars (\$5000.00), together with interest thereon, which mortgage is hereby declared to be prior and superior to this instrument." [93]

(6) That, thereafter and on the 6th day of July, 1918, the said mortgage was filed for record in the office of the Recorder of the Fairbanks Precinct aforesaid, and was thereafter recorded in Volume 8 of Real Estate Mortgages, at page 566 thereof, and indexed in Volume 3 of Chattel Mortgage Indexes as Instrument No. 51538, a true copy of which said mortgage is hereto attached and marked "Plaintiff's Exhibit B," and said mortgage is hereby referred to as if included in full in this third cause of action.

(7) That no part of said note has been paid, either principal or interest, and there is now due, owing, and unpaid on said note the principal sum of three thousand thirty-three dollars, together with interest thereon at the rate of one per centum a month from the 3d day of July, 1918.

(8) That plaintiff has been compelled to institute and prosecute this action to collect said note and has become liable to her attorney for a reasonable attorney's fee, and plaintiff is informed and believes and so alleges that the sum of \$500.00 would be a reasonable sum to be allowed to her said attorney for services rendered herein.

(9) That it is the duty of this plaintiff as such guardian to collect and conserve the assets of the estate of said David H. Cascaden, an insane person.

WHEREFORE, plaintiff prays judgment against defendant as follows, to wit:

(1) For judgment against defendant and in favor of plaintiff on her first cause of action for the

principal sum of Four Thousand Dollars, together with interest thereon at the rate of twelve per cent per annum from the 3d day of October, A. D. 1919, together with an attorney's fee in the sum of \$750.00.

(2) For judgment against defendant and in favor of plaintiff [94] on her second cause of action for the principal sum of one thousand dollars, together with interest thereon at the rate of twelve per centum per annum from the 3rd day of October, 1919, together with attorney's fee in the sum of \$250.00;

(3) For foreclosure of the mortgage described in the first and second causes of action herein, and that this Court order the United States Marshal for the Fourth Judicial Division of the Territory of Alaska to sell, in the manner prescribed by law, all the mortgaged property now remaining undisposed of, and that the proceeds thereof be paid to the plaintiff herein.

(4) For judgment against the defendant above named for the sum of three thousand thirty-three dollars, on plaintiff's third cause of action herein, together with interest thereon at the rate of twelve per centum per annum from the third day of July, 1918, together with an attorney's fee in the sum of five hundred dollars, and for an order of this Court decreeing said mortgage described in said third cause of action to be second mortgage and subordinate to the mortgage described in the plaintiff's first and second causes of action, and that, if any money remains in the hands of the United States

Marshal from the sale of the property described in Plaintiff's Exhibit "A," after paying all sums due on the notes described in the first and second causes of action herein, said money be paid and delivered to plaintiff herein, to apply on the judgment secured on the note described in the said third case of action herein.

(5) That defendant's equity of redemption in said property be fixed and determined.

(6) That this plaintiff have judgment for any deficiency that remains on the judgments secured in this action on any of the causes of action set forth herein, after application of the payments derived from the sale of the mortgaged property.
[95]

(7) That plaintiff have judgment for costs of suit, and for such other and further relief as to this Court shall appear meet, just, and equitable in the premises.

JOHN A. CLARK,
Attorney for Plaintiff.

United States of America,
Territory of Alaska,—ss.

Blanche Cascaden, being first duly sworn according to law, on her oath deposes and says: I am the duly appointed, qualified, and acting guardian of the estate of David H. Cascaden, an insane person, and am one of the plaintiffs in the above-entitled action; I have read the foregoing complaint, know the contents thereof, and the matters and things therein set forth are true, as I verily believe.

BLANCHE CASCADEN.

Subscribed and sworn to before me on this the 20th day of December, A. D. one thousand nine hundred twenty-one.

[Seal]

JOHN A. CLARK,

Notary Public in and for the Territory of Alaska.

My commission expires 24 April, 1922.

[Endorsed]: Filed Feb. 20, 1922. Rob't W. Taylor, Clerk. By Frank Bishoprick, Deputy. Mar. 31, 1923. Rob't W. Taylor, Clerk. [96]

51537.

REAL and CHATTEL MORTGAGE.

This real and chattel mortgage made this 3d day of July, 1918, by and between the Fairbanks Beverage Co. Inc., a corporation organized and existing under the laws of Alaska, party of the first part, and David H. Cascaden party of the second part, WITNESSETH:

That the party of the first part for and in consideration of the sum of five thousand (\$5,000.00) dollars paid by the party of the second part to the party of the first part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell, convey, transfer and confirm unto the party of the second part, his heirs, executors, administrators and assigns, all and singular, all real, personal and mixed property of every nature, kind and description whatsoever, located in Alaska, or elsewhere, owned by the said party of the first part; including among other properties, the following described real estate in the town of Fairbanks,

Alaska, and known as Lot 9, in Block 8; Lots 14, 15, and 16, in Block 9; Lot 2, on Block 23; Lot 5, in Block 24, Lot 3, in Block 27; and Lot 7 in Block 28, together with all and singular, all buildings, improvements, machinery, appurtenances and hereditaments thereunto belonging, or in anywise appertaining. Also, including, among other properties, that certain frame residence building heretofore known as the Barthel family residence, located on the north side of Front Street, opposite the plant formerly known as the Barthel Brewing Plant, in Fairbanks, Alaska, together with all buildings and improvements connected therewith, as well as all the furniture, fixtures and furnishings contained therein. Also including, among other properties, the tanks, buildings, machinery, tools, and appurtenances of every nature whatsoever belonging to, or forming a part of, the Fairbanks Beverage company's plant, including what was heretofore [97] known as the Barthel Brewing Company's plant, as well as the plant heretofore known as the Tanana Bottling Works, in Fairbanks, Alaska; also, all and singular, all stock and supplies of every nature whatsoever and merchandise now owned by, as well as all stock, supplies and merchandise hereafter acquired by the party of the first part in the ordinary conduct of their corporate business.

In trust, nevertheless, as a mortgage to secure the payment of two certain promissory notes of even date herewith, signed by the party of the first part, payable to the party of the second part,

bearing interest at 1% per month, from date until paid, one of said notes being for the sum of one thousand (\$1,000.00) dollars payable November 1st, 1918, the other of said notes being for the sum of four thousand (\$4,000.00) payable November 1st, 1919.

Provided, that if the party of the first part shall well and truly pay, or cause to be paid, both of said promissory notes and the whole thereof when due, together with interest thereon, according to the terms thereof, then this mortgage and the estate thereby granted and assigned shall be null and void, otherwise, to remain in full force and virtue.

It is further provided, that if the party of the first part shall fail to promptly pay said notes, or either of them, at the time the same, or either of them, is due and payable according to the terms thereof, or shall fail to pay the interest on said notes, or either of them, according to the terms of said notes, it is lawful for the party of the second part, his heirs, executors, administrators or assigns to therewith take possession of all of the personal property herein described, either with or without force, or with or without process of law and sell the same according to law as provided for the sale of personal property under execution and apply the proceeds from such sale to the payment of all costs in the premises, including a reasonable attorney's fee and the balance to the reduction or liquidation of any and all unpaid interests and principals due upon said [98] notes, or

either of them, and it is hereby mutually agreed that the United States Marshal, or his deputy, for the 4th Judicial Division of Alaska, may be directed to carry out the above provisions. And

Provided further that, if the party of the first part shall fail to pay said promissory notes, or either of them, when due, or the interest thereon, according to the terms thereof, it shall be lawful for the party of the second part, or his successors, to foreclose this mortgage and sell the property herein described, or any part thereof, according to law and out of the proceedings of such sale pay all costs in the premises, including a reasonable attorney's fee to be allowed plaintiff in such foreclosure proceedings and to pay any and all costs, interests and unpaid principals on said notes, or either of them, and to pay the residue, if any there be, to the party of the first part, or its successors. And

It is further provided that the mortgaged property herein described, and the whole thereof, may remain in the possession of the party of the first part during the life of this mortgage and until default by the party of the first part of any of the terms of this mortgage, and the taking possession of said property by or for the party of the second part. And

Provided further that the party of the first part may, until default, continue the conduct of its ordinary business by using any and all stock and supplies, herein mortgaged, in the manufacture

and sale of its various products and in the ordinary course of business.

IN WITNESS WHEREOF the party of the first part, by its President, attested by its Secretary and Treasurer, has affixed its signature the day and year first above written.

FAIRBANKS BEVERAGE CO., INC.

By D. PETREE,
President.

Attest: GEORGE WEBER,
Secretary and Treasurer. (Seal)

Witnesses:

MORTON E. STEVENS.

R. M. CRAWFORD. [99]

United States,
Territory of Alaska,—ss.

David Petree, upon behalf of the mortgagor and David H. Cascaden for himself as mortgagee, being each duly sworn upon his oath, deposes and says: That the above and foregoing mortgage is made in good faith to secure the amount of debt therein named, and for the purposes therein recited and that the same is made without any design to hinder, defraud or delay creditors.

DAVID PETREE,
DAVID H. CASCADEN.

Subscribed and sworn to before me this 3d day of July, 1918.

[Seal]

R. M. CRAWFORD.

Notary Public for Alaska.

My commission expires May 10, 1921.

United States of America,
Territory of Alaska,—ss.

This is to certify that on this 3d day of July, 1918, before me the undersigned notary public, personally appeared David Petree, who is known to me to be the president of the Fairbanks Beverage Co., Inc., and the same person who signed the foregoing instrument, and acknowledged that he signed the name of the Fairbanks Beverage Co., Inc., by himself as president, for the purposes therein mentioned and that the signing thereof was thereupon attested by George Heber, known to me to be the secretary and treasurer of said Company.

[Seal]

R. M. CRAWFORD.

Notary Public for Alaska.

My commission expires May 10, 1921.

Filed for record July 6, 1918 at 5 min. past 12
P. M. Reed W. Heilig, Recorder. [100]

51538.

REAL AND CHATTEL MORTGAGE.

This real and chattel mortgage made this 3d day of July, 1918, by and between the Fairbanks Beverage Company, Inc., a corporation organized and existing under the laws of Alaska, party of the first part, and David H. Cascaden, party of the second part.

WITNESSETH: That the party of the first part for and in consideration of the sum of three thousand thirty-three (\$3,033.00) dollars paid by

the party of the second part to the party of the first part the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell, convey, transfer and confirm unto the party of the second part, his heirs, executors, administrators and assigns, all and singular, all real, personal and mixed property of every nature, kind and description whatsoever, located in Alaska, or elsewhere, owned by the said party of the first part; including, among other properties, the following described real estate, in the town of Fairbanks, Alaska, and known as Lot 9, in Block 8; Lots 14, 15 and 16, in Block 9; Lot 2 in Block 23; Lot 5 in Block 24; Lot 3 in Block 27, and Lot 7 in Block 28, together with all and singular, all buildings, improvements, machineries, appurtenances and hereditaments thereunto belonging, or in anywise appertaining. Also, including, among other properties, that certain frame residence building heretofore known as the Barthel family residence, located on the north side of Front Street, opposite the plant formerly known as the Barthel Brewing Plant, in Fairbanks, Alaska, together with all buildings and improvements connected therewith, as well as all of the furniture, fixtures and furnishings contained therein. Also including, among the properties, the tanks, buildings, machinery, tools and appurtenances of every nature whatsoever, belonging to, or forming a part of, the Fairbanks Beverage Company's plant, including what was heretofore known as the Barthel Brewing Company's plant, as well as the plant heretofore known as the Tanana Bottling Works, in Fairbanks,

Alaska; also, all and singular, all stock and supplies of every nature whatsoever, and [101] merchandise, now owned by, as well as all stock, supplies and merchandise hereafter acquired by the party of the first part in the ordinary conduct of their corporate business. Subject, however, to that certain mortgage of this date by the party of the first part herein to the party of the second part herein, to secure two promissory notes aggregating the sum of Five Thousand (\$5000.00) Dollars, together with interest thereon, which mortgage is hereby declared to be prior and superior to this instrument.

In trust nevertheless, as a second mortgage to secure the payment of a certain promissory note of even date herewith, signed by the party of the first part, payable to the party of the second part, bearing interest at 1% per month, from date until paid, said note being for the sum of Three Thousand Thirty-three (\$3033.00) Dollars, payable July 3d, 1920.

Provided, that if the party of the first part shall well and truly pay, or cause to be paid, said note and the whole thereof, when due, together with interest thereon, according to the terms thereof, then this mortgage and the estate thereby granted and assigned shall be null and void, otherwise to remain in full force and virtue. And

It is further provided, that if the party of the first part shall fail to promptly pay said note at the time the same is due and payable according to the terms thereof, or shall fail to pay the interest on said note, according to the terms of said note,

it is lawful for the party of the second part, his heirs, executors, administrators or assigns to therewith take possession of all of the personal property herein described, either with or without force or with or without process of law and sell the same according to law as provided for the sale of personal property under execution and apply the proceeds from such sale to the payment of all costs in the premises, including a reasonable attorney's fee and the balance to the reduction or liquidation of any and all unpaid interest and principal due upon said note, and it is hereby mutually agreed that the United States Marshal, or his deputy, for the [102] 4th Judicial Division of Alaska, may be directed to carry out the above provisions. And

¶ Provided further that, if the party of the first part shall fail to pay said promissory note when due, or the interest thereon, according to the terms thereof, it shall be lawful for the party of the second part, or his successors, to foreclose this mortgage and sell the property herein described, or any part thereof, according to law, and out of the proceedings of such sale pay all costs in the premises, including a reasonable attorney's fee to be allowed plaintiff in such foreclosure proceedings and to pay any and all costs, interest and unpaid principal on said note, and to pay the residue, if any there be, to the party of the first part, or its successors. And

It is further provided that the mortgaged property herein described, and the whole thereof, may remain in the possession of the party of the first

part during the life of this mortgage and until default by the party of the first part of any of the terms of this mortgage, and the taking possession of said property, by or for the party of the second part. And

Provided further that the party of the first part may, until default, continue the conduct of its ordinary business by using any and all stock and supplies, herein mortgaged, in the manufacture and sale of its various products and in the ordinary course of business. IN WITNESS WHEREOF the party of the first part, by its president, attested by its secretary and treasurer, has affixed its signature the day and year first above written.

FAIRBANKS BEVERAGE CO., INC.

By D. PETREE,

President.

Attest:

[Seal]

GEORGE WEBER,

Secretary and Treasurer.

Witnesses:

MORTON E. STEVENS.

R. M. CRAWFORD.

United States of America,
Territory of Alaska,—ss.

David Petree, upon behalf of the mortgagor, and David H. [103] Cascaden, for himself as mortgagee, being each duly sworn, upon his oath deposes and says: That the above and foregoing mortgage is made in good faith to secure the amount of debt therein named and for the purposes therein recited

and that the same is made without any design to hinder, defraud or delay creditors.

DAVID PETREE.

DAVID H. CASCADEN.

Subscribed and sworn to before me this 3d day of July, 1918.

[Seal]

R. M. CRAWFORD,

Notary Public for Alaska.

My commission expires May 10, 1921.

United States of America,
Territory of Alaska,—ss.

This is to certify that on this 3d day of July, 1918, before the undersigned notary public, personally appeared David Petree, who is known to me to be the President of the Fairbanks Beverage Co., Inc., and the same person who signed the foregoing instrument, and acknowledged that he signed the name of the Fairbanks Beverage Co., Inc., by himself as president, for the purposes therein mentioned and that the signing thereof was thereupon attested by George Weber, known to me to be the secretary and treasurer of said company.

[Seal]

R. M. CRAWFORD,

Notary Public for Alaska.

My commission expires May 10, 1921.

Filed for record July 6, 1918, at 7 min. past 2 P. M. Reed W. Heilig, Recorder. [104]

Defendant's Exhibit 2.

\$3033.00. Fairbanks, Alaska, July 3d, 1918.

Two years after date, without grace, we promise to pay to the order of David H. Cascaden Three Thousand and Thirty-three and no/100 Dollars, in gold coin of the United States of America of the present standard value, with interest thereon in like gold coin, at the rate of one per cent per month from date until paid, for value received. Interest to be paid annually and if not so paid the whole sum of both principal and interest to become immediately due and collectible at the option of the holder of this note. And in case suit or action is instituted to collect this note or any portion thereof, we promise and agree to pay, in addition to the costs and disbursements provided by statute, a reasonable sum in like gold coin for attorney's fees in said suit or action.

Due July 3d, 1920.

No. —.

FAIRBANKS BEVERAGE CO., INC.

By D. PETREE,

Pres.

Attest: GEORGE WEBER,

Sec'y and Treas.

[Endorsed]: Filed Mar. 31, 1923. Rob't W. Taylor, Clerk. [105]

Defendant's Exhibit 3.

[Title of Court and Cause.]

MOTION FOR DEFAULT.

Comes now the plaintiff in the above-entitled action and moves this Court for the entry of an Order of Default against the defendant above named, for the reason that the defendant has failed to appear and answer the complaint on file in said action within the time prescribed by law, said defendant having been duly and regularly served with process at Fairbanks, Alaska, in the manner prescribed by law, all of which is shown by the Marshal's Return on file herein, to which reference is hereby specifically made.

Dated April 12th, 1922.

JOHN A. CLARK,
Attorney for Plaintiff.

[Endorsed]: Filed Mar. 31, 1923. Rob't W. Taylor, Clerk. April 12, 1922. Rob't W. Taylor, Clerk. By R. H. Geoghegan, Deputy. [106]

[Title of Court and Cause.]

Stipulation in Re Defendant's Exhibit No. 4.

It is hereby stipulated and agreed by and between the attorney for the plaintiffs and the attorneys for the defendant above named that, instead of inserting in the bill of exceptions herein, as Defendant's Exhibit No. 4, all the papers contained in the files of

cause numbered 2560, the following instruments shall be set forth as Defendant's Exhibit No. 4, to wit:

(1) The judgment rendered by the Court in said action No. 2560;

(2) The execution issued on said judgment on the 15th day of May, 1922; and

(3) That portion of the United States marshal's return on said execution showing property sold and selling price thereof.

It is understood that the complaint in said cause No. 2560 is Defendant's Exhibit No. 1 herein; that the motion for default therein is Defendant's Exhibit No. 3 herein; and that Defendant's Exhibit No. 4, instead of containing all other papers in said cause No. 2560, need only contain the additional papers contained in said file, as specifically set forth above, and that that portion of said file, to wit, the complaint, and the motion for default, which are separate exhibits, need not be set forth again as a part of Defendant's Exhibit No. 4.

It is further stipulated that a copy of this stipulation shall be inserted in said bill of exceptions in connection with Defendant's said Exhibit No. 4.

Dated at Fairbanks, Alaska, this 8th day of May, 1923.

JOHN A. CLARK,
Attorney for Plaintiffs.
R. F. ROTH,

Attorneys for Defendant.

[Endorsed]: Filed May 9, 1923. Rob't W. Taylor, Clerk. By Frank O'Farrell, Deputy. [107]

[Title of Court and Cause.]

Defendant's Exhibit No. 4.

JUDGMENT.

The above matter having come on regularly for trial before this Court, plaintiffs appearing by and through their attorney, John A. Clark, and the defendant not appearing, and it appearing to this Court that the defendant's default has been duly and regularly entered, as prescribed by law, and oral and documentary evidence having been introduced in support of plaintiffs' complaint, and this Court having heretofore found and established its findings of fact and conclusions of law and ordering the entry of judgment, and the Court being fully advised in the premises;

Now, therefore, it is **ORDERED, ADJUDGED AND DECREED**, as follows, to wit:

I.

That plaintiffs be, and they are hereby, given and granted judgment upon their first cause of action set forth in plaintiffs' complaint, in the sum of \$3213.82, being the balance of principal and interest due on the promissory note described in plaintiffs' first cause of action, together with an attorney's fee in the sum of \$500.00. [108]

II.

That plaintiffs be, and they are hereby, given and granted judgment upon their second cause of action set forth in plaintiffs' complaint, in the sum of \$1304.00, being the principal and interest due on the promissory note described in plaintiffs' second

cause of action, together with an attorney's fee in the sum of \$150.00.

III.

That plaintiffs be, and they are hereby, given and granted judgment against defendant for the sum of \$4409.98, being the principal and interest due on the promissory note described in plaintiffs' third cause of action, together with an attorney's fee in the sum of \$250.00.

IV.

That the mortgage described in plaintiffs' third cause of action is a second mortgage and subordinate to the mortgage described in plaintiffs' first and second causes of action.

V.

That the mortgage described in plaintiffs' first and second causes of action be, and the same is hereby ordered foreclosed, and the United States Marshal for the Fourth Division of the Territory of Alaska is hereby ordered to take under execution and sell all of the property described in the said mortgages referred to in plaintiffs' first, second and third causes of action, not heretofore sold under foreclosure of the [109] *of the* chattel portion of said mortgage described in the first and second causes of action, to wit: To sell all of the following described property now remaining undisposed of:

“Real estate in the Town of Fairbanks, Alaska, and known as Lot 9, in Block 8; Lots 14, 15, and 16, in Block 9; Lot 2 in Block 23; Lot 5 in Block 24; Lot 3 in Block 27; and Lot 7 in Block 28; together with all and singular all

buildings, improvements, machinery, appurtenances and hereditaments thereunto belonging or in anywise appertaining.

Also including, among other properties, that certain frame residence building, heretofore known as the Barthel family residence, located on the north side of Front Street, opposite the plant formerly known as the Barthel Brewing plant, in Fairbanks, Alaska, together with all buildings and improvements connected therewith, as well as all of the furniture, fixtures, and furnishings contained therein;

Also including, among other properties, the tanks, buildings, machinery, tools, and appurtenances of every nature whatsoever, belonging to or forming a part of the Fairbanks Beverage Company's plant, including what was heretofore known as the Barthel Brewing Company's Plant, as well as the plant heretofore known as the Tanana Bottling Works, in Fairbanks, Alaska;

Also all and singular all stock and supplies of every nature whatsoever and merchandise now owned by, as well as all stock, supplies, and merchandise hereafter acquired by the party of the first part (Fairbanks Beverage Co., Inc.) in the ordinary conduct of their corporate business."

VI.

That the said United States Marshal apply the net proceeds of said sale towards the satisfaction of the judgment above rendered upon the first and

second causes of action set forth in said complaint, and apply any over-plus towards the satisfaction of the judgment herein rendered upon the third cause of action set forth in said complaint, rendering any over-plus then remaining in his possession to the mortgagor.

VII.

That all of the equity of plaintiffs in and to the property covered by said mortgages be, and the same is hereby, ordered foreclosed. [110]

VIII.

That this judgment bear interest at the rate of eight per cent per annum from date hereof until paid.

For all of which, let execution issue.

Dated Fairbanks, Alaska, April 18, 1922.

CECIL H. CLEGG,

District Judge.

Entered in Court Journal No. 15, page 402.

[Endorsed]: Filed Apr. 18, 1922. Rob't W. Taylor, Clerk. By Frank Bishoprick, Deputy. [111]

[Title of Court and Cause.]

SPECIAL EXECUTION.

The President of the United States of America, to the Marshal of said Division and Territory,
GREETING:

WHEREAS, Blanche Cascaden, as Guardian of the Estate of David H. Cascaden, an insane person, and D. H. Cascaden, as Plaintiffs, recovered judgment against The Fairbanks Beverage Company,

a corporation, as defendant, in the District Court for said Division and Territory, holding terms as aforesaid, on the 18th day of April, 1922, for the sum of Ninety-eight Hundred Thirty-two and 30/100 Dollars (\$9832.30), with interest thereon at the rate of twelve per cent until paid, and costs of suit, amounting to \$22.25, and

WHEREAS, said Court by said judgment ordered the United States Marshal for the Fourth Division of Alaska to proceed to sell all of the following described real and personal property belonging to the defendant above named not heretofore disposed of, to wit:

“Real estate in the Town of Fairbanks, Alaska, and known as Lot 9, in Block 8; Lots 14, 15 and 16, in [112] Block 9; Lot 2 in Block 23; Lot 5 in Block 24; Lot 3 in Block 27; and Lot 7 in Block 28; together with all and singular all buildings, improvements, machinery, appurtenances and hereditaments thereunto belonging or in anywise appertaining.

Also including, among other properties, that certain frame residence building, heretofore known as the Barthel family residence, located on the north side of Front Street, opposite the plant formerly known as the Barthel Brewing Plant, in Fairbanks, Alaska, together with all buildings and improvements connected therewith, as well as all of the furniture, fixtures and furnishings contained therein.

Also including, among other properties, the tanks, buildings, machinery, tools, and appur-

tenances of every nature whatsoever, belonging to or forming a part of the Fairbanks Beverage Company's plant, including what was heretofore known as the Barthel Brewing Company's Plant, as well as the plant heretofore known as the Tanana Bottling Works, in Fairbanks, Alaska.

Also all and singular all stock and supplies of every nature whatsoever and merchandise now owned by, as well as all stock, supplies, and merchandise hereafter acquired by the party of the first part (Fairbanks Beverage Co., Inc.) in the ordinary conduct of their corporate business."

THEREFORE, In the name of the United States of America, you are hereby commanded to levy upon, seize and take into execution the property above described and proceed to sell same in the manner prescribed by law, and apply the proceeds to the satisfaction of this judgment, and if the sums so realized are not sufficient to settle said judgment, costs and increased costs, etc., you are then commanded to take into execution the other personal property of said defendant in your Division of said District sufficient, subject to execution, to satisfy said judgment, interest and increased interest, costs and increased costs, and make sale thereof according to law; and if sufficient personal property cannot be found, then you are [113] further commanded to make the amount of said judgment, interest and increased interest, costs and increased costs, out of defendant's real property

not exempt by law, and make return of this writ within sixty days from the date hereof.

Herein fail not, and have you then and there this writ.

Witness the Honorable E. E. RITCHIE, Judge of said court, and the seal of said court hereto affixed this 15th day of May, A. D. 1922.

[Court Seal] ROBERT W. TAYLOR,
Clerk.

By R. H. Geoghegan,
Deputy.

[Endorsed]: Filed May 15th, 1922. Return docketed July 6th, 1922. [114]

[Title of Court and Cause.]

MARSHAL'S RETURN ON SPECIAL EXECUTION.

I, G. B. Stevens, United States Marshal, for the Fourth Division, Territory of Alaska, do hereby certify and return, that I received the hereto attached Original Special Execution at Fairbanks, Alaska, on the 15th day of May, 1922, and that thereafter on the 17th day of May, 1922, I duly executed same by posting notice of the time and place of sale, in three public places within five miles of the place where the sale was to take place, to wit: One on the front of the United States Courthouse, one in the United States Postoffice and one on the McIntosh & Kubon Building at the corner of First Ave. and Cushman Street, all of said places being in the town of Fairbanks, Alaska, and did cause

said Notice of Sale to be published in the Fairbanks Daily News Miner, a newspaper of general circulation nearest the place where sale is to take place, for four consecutive weeks prior to said sale, as appears from the affidavit of W. F. Thompson, publisher of the said Fairbanks Daily News Miner, which is hereto attached and made a part of this return; fixing time and place of sale at 2 P. M., June 16, 1922, at the front door of the United States Courthouse, Fairbanks, Alaska.

That thereafter on the 16th day of June, 1922, at 2 P. M., at the front door of the United States Courthouse, this being the time and place appointed for said sale, I offered for sale and did sell to John A. Clark, attorney for plaintiff, for the sum of \$5,000.00, he being the highest and best bidder, and that being the only bid offered at said sale; all of the right, title and interest of the defendant in and to the following described property, to wit:

Lot No. 9 in Block No. 8.

Lots No. 14, 15 and 16 in Block No. 9.

Lot No. 2 in Block No. 23.

Lot No. 5 in Block No. 24.

Lot No. 3 in Block No. 27.

Lot No. 7 in Block No. 28.

According to the official survey of L. S. Robe for the town site trustee, together with all and singular, all buildings, improvements, machinery, appurtenances and hereditaments thereunto belonging or in anywise appertaining, all of said property being situate in the Town of Fairbanks, Fairbanks Re-

ording District, Fourth Judicial Division, Territory of Alaska.

That thereafter on the 16th day of June, 1922, I further executed said Special Execution with notice of garnishment on John A. Clark, who made answer that he had in his possession the following notes, to wit:

Note dated December 17, 1917, for \$1500.00, payable to the First National Bank, signed by Romeo Hoyt, H. Claude Kelly and the Barthel Brewing Co., and by said bank assigned to the Fairbanks Beverage Co. [115]

Note dated July 1, 1919, for \$710.75, payable to the Fairbanks Beverage Company, and signed by A. J. Nordale.

Note dated July 24, 1919, for \$217.00, payable to the Fairbanks Beverage Company and signed by H. Claude Kelly and Romeo Hoyt, which answer is hereto attached and made a part hereof, said notes were delivered into my possession on the 16th day of June, 1922.

That thereafter on the 19th day of June, 1922, I caused notices of sale to be posted in three public places in the town of Fairbanks, Fourth Division, Territory of Alaska, and within five miles of where the sale is to take place, as follows, to wit:

One on the Federal Courthouse, one on the Federal Postoffice, and one on the McIntosh and Kubon Building at the corner of First Ave. and Cushman Street, fixing the time and place of sale at 2 P. M. on the 30th day of June, 1922, at the front door of the Federal Courthouse.

That thereafter at 2 P. M. on the 30th day of June, 1922, in front of the Federal Courthouse, this being the time and place set for said sale, I offered for sale and did sell to John A. Clark, attorney for plaintiff, for the sum of Three Hundred Five and no/100 (\$305.00), that being the highest and best bid, and that being the only offer made at said sale;

The following described personal property, to wit:

Three (3) certain promissory notes particularly described as follows:

Note given by Hoyt and Kelly and endorsed by the Barthel Brewing Company, dated December 17th, 1917, for the sum of Fifteen Hundred and no/100 (\$1500.00) Dollars, payable to the First National Bank and by said bank assigned to the Fairbanks Beverage Company, a corporation, with accrued interest thereon amounting to the sum of Seven Hundred Sixteen and 50/100 (\$716.50) Dollars.

Note given by Kelly and Hoyt dated July 24th, 1919, for the sum of Two Hundred Seventeen and no/100 (\$217.00) Dollars and payable to the Fairbanks Beverage Company, a corporation, with accrued interest thereon amounting to the sum of Seventy-six and 38/100 (\$76.38) Dollars.

Note given by A. J. Nordale dated July 1st, 1919, for the sum of Seven Hundred Ten and 75/100 (\$710.75) Dollars, and payable to the Fairbanks Beverage Company, a corporation, with accrued interest thereon amounting to the sum of One Hundred Seventy and 58/100 (\$170.58) Dollars.

Note Number One for the sum of..\$	5.00
“ “ Two for the sum of..	200.00
“ “ Three for the sum of ..	100.00
	<hr/>
	\$305.00

Dated at Fairbanks, Alaska, this 6th day of July,
A. D. 1922.

G. B. STEVENS,
United States Marshal.
By John J. Buckley,
Deputy. [116]

[Endorsed]: Filed Jul. 6, 1922. Rob't W. Taylor,
Clerk. By Grace Fisher, Deputy. [117]

Defendant's Exhibit 5.

\$2000.00. Fairbanks, Alaska, February 5th, 1918.

On or before July 1st, 1918, after date, without grace, for value received, I promise to pay to the order of George Weber at the office of St. George & Cathcart, in Fairbanks, Alaska, the sum of Two Thousand and 00/100 Dollars with interest thereon at the rate of one per cent per month from date hereon until paid; both principal and interest payable in lawful money of the United States. Interest to be paid at maturity and if not so paid the whole sum of both principal and interest shall become immediately due and collectible at the option of the holder of this note. In the event suit is brought to collect this note, or any portion thereof, I promise to pay in addition to the costs and disbursements

provided by statute, a reasonable amount for attorneys' fees. For value received, each and every party signing this note, either as indorser, surety, guarantor or assignor, waives presentment, demand, protest and notice of nonpayment thereof and binds himself thereon as a principal.

Due July 1st, 1918.

D. PETREE.

D. H. CASCADEN.

[Endorsed]: Filed Mar. 31, 1923. Rob't W. Taylor, Clerk. [118]

Defendant's Exhibit 6.

Credit	in full	
	Note	3000
Date Jun. 25, 1918.		

[Endorsed]: Filed Mar. 31, 1923. Rob't W. Taylor, Clerk. [119]

Defendant's Exhibit 7.

Minutes of Special Meeting of the Board of Directors of the Fairbanks Beverage Company, Inc., June 25, 1918.

At a special meeting held at the office of the Fairbanks Beverage Co., Inc., on June 25th, 1918, there being present all of the directors of said company, to wit: David Petree, David H. Cascaden and George Weber; the holding of said meeting unanimously agreed to and notice thereof, as well as notice of the objects of said meeting having been expressly waived, the following proceedings were had, to wit:

After a discussion of the finances of the company and it appearing that a note for three thousand (\$3,000.00) dollars and interest due to the Farmers' Bank of Fairbanks, Alaska, secured by a mortgage on a portion of the property of the Fairbanks Beverage Co., Inc., has been due since April 30th, 1918, and that, in addition thereto said company needs ready money to the extent of about five thousand (\$5,000.00) dollars, for the purpose of extending and carrying on its business and liquidating its bills payable, David H. Cascaden expressed his willingness to loan this company said necessary money aggregating about eight thousand twenty-five (\$8,025.00) dollars, at the banking rate of 12% interest per annum, for a reasonable time, upon condition that the said company execute to said Cascaden its promissory notes secured by mortgage upon the assets of said corporation.

Thereupon it was moved by David Petree, seconded by George Weber and unanimously carried, that said offer be accepted and that this company, by its President and Treasurer, be authorized and directed to make, execute and deliver to the said Cascaden its promissory note, or notes, aggregating the sum of five thousand (\$5,000.00) dollars, bearing interest at 12% per annum for such time as may be agreed upon, secured by a first mortgage upon all of the assets of said company. And in order to obtain [120] said loan and execute said security that the officers of this company be further authorized and directed to make, execute and deliver to the said Cascaden its promissory note

for the amount of three thousand (\$3,000.00) dollars and accumulated interest on said Farmers' Bank debt, secured by a second mortgage upon the assets of this company for the purpose of paying and liquidating the note and mortgage of three thousand (\$3,000.00) dollars and interest due to the Farmers' Bank of Fairbanks, Alaska. And, further, that action be forthwith taken to carry out the objects of this resolution.

There being no other business to come before this meeting it was moved, seconded and carried that this Directors' meeting be adjourned.

DAVID PETREE.

[Seal]

DAVID H. CASCADEN.

GEORGE WEBER.

A true copy.

Attest: GEORGE WEBER,

Sec'y and Treas.

[Endorsed]: Filed Mar. 31, 1923. Robt. W. Taylor, Clerk. [121]

That thereafter on April 2, 1923, and before the arguments of attorneys and the instructions of the Court, the plaintiffs filed the following motion for a directed verdict, to wit: [122]

[Title of Court and Cause.]

Motion to Dismiss Affirmative Defense and Counter-claim in Defendant's Amended Answer and for a Directed Verdict Thereon.

Come now the plaintiffs above named, at the close of the evidence in said cause introduced in

behalf of both plaintiffs and defendant, and move this Court for an order, dismissing the so-called affirmative defense and counterclaim set forth in the defendant's amended answer, and for an order, directing the jury to find against said defendant on said affirmative defense and counterclaim, on the ground and for the reason that it conclusively appears, from all the evidence introduced in said cause, that there was no consideration whatsoever for the execution of the note described in defendant's affirmative defense and counterclaim, so far as David H. Cascaden is concerned; that all the evidence shows conclusively that, at the time of the execution of said note, David H. Cascaden was not indebted to George Weber in any sum whatsoever, and that the signing of said note by David H. Cascaden was not made a condition of the acceptance of said note by the defendant, that defendant did not request that said David H. Cascaden sign said note and did not know that said note was signed by David H. Cascaden until after it had been delivered to him; and it further appears that there was no obligation [123] whatsoever on the part of David H. Cascaden to sign said note, and that said David H. Cascaden was a voluntary maker of said note without consideration and without solicitation on the part of the defendant or anyone else, so far as the evidence shows.

Dated at Fairbanks, Alaska, on this, the 2d day of April, A. D. one thousand nine hundred twenty-three.

JOHN A. CLARK,
Attorney for Plaintiffs.

[Endorsed]: Filed Apr. 2, 1923. Rob't W. Taylor, Clerk. By Frank O'Farrell, Deputy.

Due service hereof admitted this 2 April, 1923.

R. F. ROTH,
Attorney for Deft. [124]

Which said motion was denied by the Court; to which plaintiffs then and there excepted, and said exception was allowed.

That, thereafter, said cause was argued to the jury by counsel for the respective parties, and thereupon the Court instructed said jury as follows, to wit: [125]

[Title of Court and Cause.]

Instructions of the Court.

Gentlemen of the Jury:

1.

You are instructed that this is a civil action in which David H. Cascaden, and Blanche Cascaden as Guardian of the Estate of David H. Cascaden, an insane person, are plaintiffs, and George Weber is defendant.

The complaint alleges that Blanche Cascaden is the duly appointed guardian of said David H. Cascaden, an insane person, and that on or about the 21st day of October, 1917, the defendant George Weber borrowed from the Farmers' Bank of Alaska the sum of \$3,000.00, and that plaintiff David H. Cascaden and David Petree signed a note then and there given by said Weber to the

said Farmers' Bank of Fairbanks as joint makers with the defendant Weber, but that said money was for the sole use and benefit of the defendant Weber. The note is set out in full in the complaint, and the endorsements thereon. And it is alleged that the defendant Weber, at the maturity of said note, failed and neglected to pay same, and that David H. Cascaden thereafter, on the 25th day of June, 1918, paid the amount of said note, together with \$30.00 interest thereon, and that the defendant Weber has not repaid the amount of said note to plaintiff, nor any part thereof, and that the principal sum thereof is now due, [126] owing and unpaid from defendant to plaintiff, together with interest, that is to say, the sum of \$3,030.00 at one per cent per month from the 25th day of June, 1918.

The complaint also alleges that the plaintiff has been compelled to employ an attorney, and that the reasonable attorney's fee for instituting and conducting said action is the sum of \$600.00.

In a second and further cause of action against the defendant by the said plaintiffs it is alleged that the said D. H. Cascaden loaned to the said George Weber the sum of \$500.00 on or about the 25th day of June, 1918, and at said time the defendant Weber made, executed and delivered to the said Cascaden a certain promissory note for said sum, a copy of which is set out in the complaint in the second cause of action. And it is alleged that the defendant has not paid said note, or any part thereof, and the whole thereof is now due, together

with interest at the rate of one per cent per month from June 25, 1918.

And further, that plaintiffs have been compelled to employ an attorney with reference to securing judgment upon said last-mentioned note, and that a reasonable attorney's fee therefor is the sum of \$150.00.

Plaintiff therefore asks judgment against the defendant Weber as follows:

First. On the first cause of action, the principal sum of \$3,030.00, together with interest thereon at the rate of one per cent per month from the 25th day of June, 1918, together with an attorney's fee of \$600.00.

Second. On plaintiffs' second cause of action, for the sum of \$500.00, together with interest at the rate of one per cent per month from June 25, 1918, together with an attorney's fee in the sum of \$150.00.

The defendant, in his amended answer, denies that he individually [127] borrowed from the Farmers' Bank of Fairbanks, on the 3d day of October, 1917, or at any other time, or at all, the sum of \$3,000.00, for which a note was given signed by George Weber, and David Petree and D. H. Cascaden, as makers thereof, and denies that David Petree or David H. Cascaden, or either of them, signed said note as accommodation maker, and denies that the money borrowed at said time from said bank was for the sole use and benefit, or sole use or benefit, of defendant.

The defendant admits that David H. Cascaden paid the said promissory note set forth in plaintiffs' first cause of action, but denies that the sum was paid at maturity, or at any time prior to the 3d day of July, 1918, and denies that the sum of \$30.00 was the amount paid by Cascaden as interest thereon, and denies that any other sum was paid as interest thereon except the sum of \$33.00 to said Farmers' Bank of Fairbanks. And the defendant also denies that the said David H. Cascaden was not repaid the principal sum named in the promissory note set forth in plaintiffs' first cause of action, and denies that said David Cascaden was not paid the amount of interest which he paid upon said note, and further denies that there is anything due, owing or unpaid from plaintiff to defendant by or on account of said promissory note or interest.

And defendant further, in his second and affirmative defense to the first cause of action, alleges that the promissory note set forth in plaintiffs' first cause of action was, on the 3d day of July, 1918, paid in full by the Fairbanks Beverage Company by the execution of a promissory note in the sum of \$3,033.00 in favor of David H. Cascaden and the mortgage securing the payment of the same, which said mortgage was filed for record in the office of the recorder of the Fairbanks Precinct, Fourth Division of Alaska, on the 6th day of July, 1918, as was and is now recorded in Volume 8 of Real Estate Mortgages, at page 546, et seq., thereof, and indexed in Volume 3 of Chattel Mortgage Indexes

as [128] Instrument No. 51,538, and that the same was accepted as payment in full by said Cascaden, and that the note sued upon by plaintiffs in the first cause of action was then and there delivered up and surrendered by said Cascaden.

As answer to the second cause of action set up by plaintiffs, defendant admits that on or about the 25th day of June, 1918, he made, executed and delivered to David Cascaden the promissory note set forth and described in plaintiffs' second cause of action, and denies that the same has not been paid and that there is anything now due, either of principal or interest, to plaintiffs on account thereof.

And for a second and affirmative defense to the matters and things set forth in the second cause of action of plaintiffs, and as a counterclaim thereto, defendant alleges:

That on the 5th day of February, 1918, the plaintiff Cascaden together with one D. Petree, for a valuable consideration, made, executed, and delivered to him a certain promissory note in writing for the sum of \$2,000.00, and interest at the rate of one per cent per month until paid, dated at Fairbanks, Alaska, February 5, 1918, and due July 1st, 1918, a copy of which said note is set forth in defendant's second and affirmative defense to plaintiffs' second cause of action. And further claims that no part of said sum of \$2,000.00 has been paid either by the plaintiff Cascaden or by David Petree to defendant, and that no part of the interest due thereon has been paid by plain-

tiff or by said Petree to the defendant, and that the whole sum of \$2,000.00, together with interest thereon at the rate of one per cent per month from the 5th day of February, 1918, is now due and owing. And further claims that the defendant Weber has been compelled to and has employed an attorney to defend this action and to collect the amount due on said last-mentioned promissory note, and that a reasonable attorney's fee therefor is the sum of \$350.00. [129] That defendant therefore asks for judgment against the plaintiff for interest on the sum of \$2,000.00 at the rate of one per cent per month from the 5th day of February, 1918, to the 25th day of June, 1918, together with interest at the rate of one per cent per month on \$1,500.00 from the 25th day of June, 1918, and for the said sum of \$1,500.00; and further, for the sum of \$350.00 attorney's fees.

Plaintiff replies to the amended answer of defendant, and to the further second and affirmative defense to the first cause of action, as found on page 2 of defendant's answer, as follows:

First, plaintiffs admit that on or about the 3d day of July, 1918, the Fairbanks Beverage Company executed and delivered to plaintiff Casca-den a promissory note in the sum of \$3,033.00 and a mortgage securing the same, which mortgage was filed as alleged in said so-called second and affirmative defense.

And, second, denies that said mortgage was accepted as payment in full of said note described in plaintiffs' complaint or as a payment thereon.

And, third, denies that said promissory note sued on by the plaintiff and described in plaintiff's complaint, paragraph 4, was delivered up and surrendered by said Cascaden.

And, fourth, denies that the said note and mortgage were accepted in full payment, or payment at all, of said indebtedness described in plaintiffs' complaint, or that it was accepted otherwise than as security for the amount due to said David H. Cascaden, and plaintiffs deny that said note, or any part thereof, has ever been paid.

And for a further affirmative reply to the said second and affirmative defense to plaintiffs' first cause of action plaintiff alleges:

First, that said mortgage described in said second affirmative defense of defendant was a second mortgage on said property [130] situated in Fairbanks, and that said mortgage has never been paid, and that on a foreclosure of the first mortgage on said property described in said mortgage given by the Fairbanks Beverage Company to said Cascaden, plaintiff, for \$3,033.00, said property did not sell for sufficient to pay the first mortgage, and that, therefore, the second mortgage remains wholly unpaid.

And plaintiffs further replying to the second and affirmative defense to the matters and things set forth in the second cause of action in plaintiffs' complaint, and as a counterclaim against David H. Cascaden, plaintiffs herein deny, first the allegations of paragraph 1 of said so-called further second and affirmative defense; and, second, admit

that no part of the promissory note or interest in favor of defendant Weber, signed by Petree and Cascaden, as set forth in the further second and affirmative defense of defendant, has been paid, and denies that defendant has been compelled to and has employed an attorney to defend this action and to collect said promissory note, with interest; and further denies that the reasonable attorney's fee for such services is the sum of \$350.00.

And further replying affirmatively to said so-called further second and affirmative defense to plaintiff's second cause of action, plaintiff alleges as follows, to wit:

That the promissory note described in paragraph 1 of said so-called second affirmative defense set forth in the amended answer in paragraph 3 was, at the time of the making thereof, and ever since has been, without consideration, and that neither the plaintiff Cascaden nor David Petree was or is liable to defendant in any sum whatsoever by reason of the making of said note.

And for a second affirmative reply to the matters and things set forth in said second and affirmative defense to plaintiffs' second cause of action plaintiff alleges:

That prior to the 5th day of February, 1918, Cascaden, Weber, [131] and Petree had purchased from one Allberg certain property in the town of Fairbanks, and that the purchasers paid on account of the purchase price the sum of approximately \$5,000.00, and there remained due to said Allberg approximately the sum of \$3,000.00.

Second, that Weber, the defendant herein, fearing that he might be compelled to pay the balance of the said purchase price of said property to Allberg in the absence of Cascaden and Petree, and as a protection in the event that he should be compelled to make such payment, procured from Cascaden and Petree the promissory note described in paragraph 3 of defendant's answer, which said promissory note was to be paid by said Cascaden and Petree to Weber in the event that Weber was compelled to pay to Allberg the balance of the purchase price on said property purchased from Allberg described above, namely \$3,000.00. That said note was intended to reimburse Weber in the event he paid the proportion of the balance of the purchase price properly payable by Cascaden and Petree. And further, that Weber never paid to Allberg the balance of the said purchase price of said property, and that the consideration of said note failed, and that the same is without consideration and void, and that plaintiff Cascaden is not now and never has been liable for the payment of any part or portion thereof.

And plaintiff prays that defendant take nothing by his so-called affirmative defenses, and that plaintiffs have judgment as prayed for in the complaint.

2.

In this case, as in all civil cases, the jury and the Judge of this court each have separate functions to perform. It is your duty to hear all the evidence, all of which is addressed to you, and thereupon to decide and determine the questions of

fact arising from the evidence; and it is the duty of the Judge of this court to decide all questions of law involved in the trial [132] of the case, and the law makes it your duty to accept as law what is laid down as such by the Court in these instructions.

3.

You are instructed that you are the sole judges of all questions of fact, and of the effect of the evidence, and the weight to be given to the testimony of the witnesses; but your power in this respect is not arbitrary, but is to be exercised by you with legal discretion and in subordination to the rules of evidence laid down in these instructions.

4.

In determining the credit you will give to a witness, and the weight and value you will attach to his testimony, you should take into consideration the conduct and appearance of the witness upon the stand, the interest he has, if any, in the result of the trial, the motive he has in testifying, if any is shown, his relation or feeling for or against the defendant, the probability or improbability of the statements of such witness, and the opportunity he had to observe and to be informed as to the matters respecting which he gave testimony before you, and the inclination he evinced, in your judgment, to speak the truth, or otherwise, as to matters within the knowledge of such witness.

It is your duty to give to the testimony of each and all of the witnesses such credit as you con-

sider their testimony justly entitled to receive, and in so doing you should not regard the remarks or expressions of counsel unless the same are in conformity with the facts proved or are reasonably deducible from such facts and the law as given in these instructions.

5.

Evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict, and, therefore, if the weaker and less satisfactory evidence is offered [133] when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust.

6.

You are instructed that in considering the evidence in this case you are not bound to find a verdict in conformity with the declaration or testimony of any number of witnesses, when their evidence does not produce conviction in your minds, against a lesser number of witnesses, or other evidence, which is satisfying to your minds.

The weight of the evidence does not depend so much upon the number of witnesses who testify as upon the character and probability of the facts stated by them, and upon the character and reasonableness of their testimony and the opportunity the witnesses had for seeing and knowing the facts stated by them.

7.

You are instructed that in all civil cases the

affirmative of the issue shall be proved, and when the evidence is contradictory the findings shall be according to the preponderance of the evidence, by which is meant the greater weight of the evidence; that is to say, that before the plaintiff can recover, the plaintiff must prove all the allegations of the first cause of action by a preponderance of the evidence, and if the plaintiff fails to do so, or if the evidence is evenly balanced, your verdict should be for the defendant on the first cause of action of plaintiff set up in plaintiff's complaint.

8.

You are instructed that the defendant George Weber, as a counterclaim, claims that plaintiff David H. Cascaden is indebted to him in the sum of \$2,000.00, together with interest thereon, on a promissory note signed by David H. Cascaden, plaintiff in [134] this case, and David Petree, dated February 5, 1918, less the sum of \$500.00, with interest, on a promissory note given to David H. Cascaden by defendant George Weber on the 25th day of June, 1918, which last-mentioned note for \$500.00 is set up as the second cause of action in plaintiff's complaint. And you are instructed that there being no competent evidence introduced by the plaintiff in opposition to said claim, the Court now instructs you that you should find for the defendant George Weber with reference to said counterclaim; that is to say, for the sum of \$1,500.00 principal, with interest on the sum of \$2,000.00 at the rate of one per cent per month from the 5th day of February, 1918, to the 25th

day of June, 1918, together with interest at the rate of one per cent per month on the sum of \$1,500.00 from the 25th day of June, 1918, to this date; and also for such further sum as you deem reasonable for attorney's fees.

9.

You are instructed that by reason of the foregoing instruction there is left for your consideration to be determined by you whether or not the plaintiff should prevail as to the first cause of action set forth in the complaint, in which the plaintiff alleges that the defendant George Weber is indebted to plaintiff in the sum of \$3,000.00 and interest on a certain promissory note dated the 31st day of October, 1917, which is set forth in paragraph 4 of plaintiffs' complaint, and which it is alleged that the plaintiff David H. Cascaden paid on the 25th day of June, 1918, in full, together with \$30.00 interest thereon, and which it is alleged that the defendant Weber has not repaid to the plaintiff, and that the whole of said sum of \$3,030.00, with interest at the rate of one per cent per month from the 25th day of June, 1918, is now due and unpaid; and also for the sum of \$600.00 attorney's fee in instituting and conducting this [135] litigation with reference to this first cause of action; and also for the sum of \$150.00 for instituting and maintaining the litigation with reference to plaintiffs' second cause of action on the note for \$500.00, with interest, the principal of which said note and interest is admitted by the defendant to be due to the plaintiff.

10.

You are instructed that if you find from a preponderance of the evidence in the case that the amount of said note and interest is now due, owing and unpaid from the defendant George Weber to the plaintiff, your verdict should be in favor of the plaintiff on his first cause of action for the full amount of said note and interest, and attorney's fees prayed for; and you are instructed that the amount of said attorney's fees which you allow should include a reasonable amount for both causes of action set forth in the complaint.

11.

You are instructed that the defendant admits the execution by George Weber, Dave Petree and D. H. Cascaden of the promissory note described in plaintiffs' first cause of action, and defendant also admits that D. H. Cascaden paid said note to the Farmers' Bank of Fairbanks, and therefore plaintiffs are not required to introduce any evidence as to the execution and delivery of the note or the payment thereof by David H. Cascaden. Defendant alleges that the amount of the note was repaid to Cascaden by the execution of a note and mortgage from the Fairbanks Beverage Company to Cascaden, to secure the amount that Cascaden paid to the Farmers' Bank of Fairbanks in the sum alleged to be \$3,033.00. Defendant also alleges that said Cascaden accepted the mortgage as full payment of the amount due to him by reason of his having to pay said sum to the Farmers' Bank. Defendant also alleges that the original note to

the Farmers' Bank, paid by David H. [136] Cascaden, was surrendered and canceled. You are therefore instructed that the burden of proof is on the defendant to prove what he has alleged, and unless he does prove it to your satisfaction by a preponderance of evidence, your verdict must be for the plaintiffs on said first cause of action.

12.

You are instructed that an accomodation maker of a note is one who signs a note as principal to enable other signers of the note to secure money thereon, and if an accommodation maker is compelled to pay the note he is entitled to recover from any or all the signers on said note for whose use the money was secured the entire amount that he was compelled to pay thereon.

13.

You are further instructed that if one of the signers of a note is compelled to pay the whole note, any or all of the other signers of the note are liable for the repayment to the party who paid the note of the amount that was paid on the note over and above what was for the personal use or benefit of the person who paid the note; and if you are satisfied by a fair preponderance of evidence that no part of the money represented by the \$3,000.00 note given to the Farmers' Bank of Fairbanks was for the use and benefit of David H. Cascaden, then you are instructed that the defendant would be liable to David H. Cascaden and to his guardian for the entire amount that said David H. Cascaden was compelled to pay to the

Farmers' Bank of Fairbanks, unless you find that said indebtedness of Weber and Petree was transferred to the Fairbanks Beverage Company by and with the consent of said David H. Cascaden.

14.

You are instructed that the defendant admits that David H. Cascaden did pay the sum of \$3,030.00, being the principal and interest due upon said note, on the 25th day of June, 1918, but [137] said defendant claims that after said David H. Cascaden paid the amount of said note and interest he agreed to accept in payment of said sum the note of the Fairbanks Beverage Company, Incorporated, in which said company George Weber, David Petree and David H. Cascaden were the principal stockholders, which said note of said company was to be secured by a mortgage upon certain property in the town of Fairbanks, and that in pursuance of such agreement that the note of said Fairbanks Beverage Company and said mortgage agreed upon were made, executed and delivered to the said David H. Cascaden, and that he accepted the same as repayment of the amount expended by him in taking up the note of Weber and Petree to the Farmers' Bank of Fairbanks; and if you find and believe from a preponderance of the evidence that this contention is true your verdict should be in favor of the defendant Weber as to plaintiffs' first cause of action.

15.

You are instructed that if David H. Cascaden paid the note set forth in plaintiffs' first cause of action

to the Farmers' Bank of Fairbanks and took a note for \$3,033.00 and a mortgage from the Fairbanks Beverage Company, this act on the part of Cascaden constituted a payment of the promissory note set forth in plaintiffs' first cause of action; and the question as to whether or not the mortgage so taken was a first or second mortgage is immaterial, and also as to whether or not said note of \$3,033.00 was or was not paid by the Fairbanks Beverage Company is immaterial, because the debt was changed by the aforesaid transaction from David Petree and defendant to the Fairbanks Beverage Company by express agreement with plaintiff Cascaden; and in that event the defendant Weber was released entirely from any obligations on account of said note set forth in plaintiffs' first cause of action, and the said Cascaden can look only to the Fairbanks Beverage Company for payment of the said [138] note for \$3,033.00, and the defendant Weber would not be responsible for the payment of the same, or any part thereof, and your verdict should be for the defendant on plaintiffs' first cause of action.

16.

You are instructed that there is no evidence in this case whatever that would tend to prove that the note for \$3,033.00, executed by the Fairbanks Beverage Company in favor of plaintiff David H. Cascaden, was given as additional security for the payment of said promissory note marked Plaintiffs' Exhibit "A"; and there is nothing contained in the complaint of plaintiffs by which competent evi-

dence could be introduced to show that said note for \$3,033.00, executed by the Fairbanks Beverage Company to the plaintiff David H. Cascaden, was given as additional security for the payment of said note of \$3,000.00, marked Plaintiffs' Exhibit "A"; and the jury are therefore instructed that they would not be warranted in considering said note of \$3,033.00 as additional security for the payment of said promissory note marked Plaintiffs' Exhibit "A."

17.

You are further instructed that whether you find for the plaintiff or defendant you should ascertain and determine, and insert in either verdict, the amount of the attorney's fee to which either the plaintiff or defendant may be entitled, as the case may be.

18.

(Not given.)

19.

The jury should endeavor to agree upon a verdict, and you should consider these instructions as a whole and not disconnectedly. [139]

In conformity with the law I have prepared two forms of verdict, which you will take with you into your jury-room, and when you shall have unanimously agreed upon your verdict you will sign, by your foreman, that form upon which you have agreed and return it into court as your verdict, and the other form you will destroy.

The forms are:

(1) Find and return a verdict in favor of the

plaintiff and against the defendant, and that plaintiff is entitled to recover from the defendant the sum of \$3033.00, with interest at the rate of one per cent per month from the 25th day of June, 1918, together with an attorney's fee on the first cause of action in the sum of \$—— and on the second cause of action in the sum of \$——, less the sum of \$1500.00 principal with interest on \$2000.00 at the rate of one per cent per month from the 5th day of February, 1918, to the 25th day of June, 1918, together with interest at the rate of one per cent per month on \$1500.00 from the 25th day of June, 1918, together with the sum of \$—— as a reasonable attorney's fee.

(2) Find and return a verdict in favor of the defendant and against the plaintiff, and that defendant is entitled to recover from the plaintiff the sum of \$1500.00 principal, with interest on \$2000.00 at the rate of one per cent per month from the 5th day of February, 1918, to the 25th day of June, 1918, together with interest at the rate of one per cent per month on \$1500.00 from the 25th day of June, 1918, to the date of judgment, and for the sum of \$—— attorney's fees.

With these forms of verdict I now hand you the written instructions which I have just read to you for your guidance, the pleadings in the case, consisting of the complaint, answer and reply, and the documentary exhibits introduced in evidence in [140] this case, and these you will return into Court with your verdict.

Dated at Fairbanks, Alaska, this 2d day of April, 1923.

CECIL H. CLEGG,
District Judge. [141]

That plaintiffs requested the Court, in addition to the instructions already given, to instruct the jury as follows, to wit: [142]

[Title of Court and Cause.]

Request for Instructions.

To the Hon. CECIL H. CLEGG, Judge of the
Above-entitled Court:

Come now the plaintiffs above named and request this Court to instruct the Jury in writing and that the Court give the following instructions, to wit: [143]

1.

You are instructed that the defendant admits in his pleadings the making, execution, and delivery of the promissory note described in plaintiffs' second cause of action, and unless you are satisfied that the defendant has proved, by a preponderance of evidence, that David H. Cascaden, together with Dave Petree, is indebted to defendant on the promissory note described in defendant's answer, your verdict must be for the defendants on their second cause of action set forth in their complaint. [144]

2.

You are instructed that, in the first instance, the plaintiffs were obliged to prove the allegations of

their complaint by preponderance of evidence, and when that was done, then the burden shifted to the defendant to disprove plaintiffs' case and to prove the affirmative matter set forth in his answer by a preponderance of evidence, and that, so far as the counterclaim set forth in the defendant's answer is concerned, he becomes the plaintiff and the burden of proof shifts to him and he must prove the allegations of said answer as regards the counterclaim by a preponderance of evidence. [145]

6.

You are instructed that the plaintiffs in this action claim that the note for \$2,000.00, given by David Petree and David H. Cascaden to George Weber, was given to protect the defendant from loss if he was compelled to pay to one Allberg the sum of \$3000.00 alleged to have been due to said Allberg, and if you are satisfied from the evidence that that was the purpose for which said note was given, then you are instructed that if said Weber did not pay said Allberg the sum of \$3000.00, then said note was without consideration and neither of the makers thereof would be liable to said Weber for any part thereof. And if you are satisfied that said note was given for the purpose above set forth, then the burden is on the defendant to show that said payment was made to said Allberg, or some one for his use and benefit, prior to the time of the filing of defendant's amended answer in this cause. [146]

7.

You are instructed that there must be a good and valuable consideration for every contract or said

contract can not be enforced, and you are further instructed that if the consideration for a contract is the performance by the person for whose benefit said contract is made of some act in the future, and he fails to perform said act or acts, then the consideration for said contract is said to have failed and said contract cannot be enforced. [147]

8.

The plaintiffs have pleaded, in their amended reply on file herein, that the note described in defendant's amended answer was, and is, without consideration, and you are instructed that, if you find from the evidence that, at the time David H. Cascaden signed said note, he was not indebted to George Weber and was under no obligation to execute said note, then you should find against the defendant on his counterclaim. [148]

9.

You are instructed that one of the issues in this cause is as to whether or not there was a good and valuable consideration for the note described in defendant's amended answer, the plaintiffs herein having denied that there was any consideration for said note so far as David H. Cascaden is concerned, and, under the rules of evidence, the burden is placed upon the defendant to prove, by a preponderance of the evidence, that there was a good and valuable consideration for the signing of said note by David H. Cascaden, and if the defendant fails to prove said consideration, by a fair preponderance of evidence, then he cannot prevail upon his counterclaim set forth in his amended answer, and your

verdict must be against said defendant on said counterclaim. [149]

That the Court then and there refused to give said requested instructions to the jury, to which refusal plaintiffs then and there excepted, and said exception was allowed.

That, prior to the retirement of said jury and in the presence of said jury and after they had been instructed by the Court, plaintiffs made the following objections to the instructions already given to said jury by the Court, and excepted to his refusal to give their proposed instructions, as follows, to wit: [150]

Mr. CLARK.—Plaintiffs except to instruction No. 8 given by the Court to the jury on the ground that the Court takes the matter entirely out of the hands of the jury and passes upon matters of fact that should be passed upon by the jury, and that it is contrary to law.

The COURT.—Exception allowed.

Mr. CLARK.—Plaintiffs except to instruction No. 9 given by the Court to the jury for the reason that it is predicated upon the eighth instruction, to which we have heretofore excepted, in that it limits the findings of the jury simply to matters contained in plaintiffs' complaint, having already instructed the jury to bring in a verdict in favor of the defendant upon his counterclaim.

The COURT.—Exception allowed.

Mr. CLARK.—Plaintiffs except to the last portion of instruction No. 13 given by the Court to the jury wherein it is recited as follows:

“Unless you find that said indebtedness of Weber and Petrie was transferred to the Fairbanks Beverage Company by and with the consent of said David H. Cascaden”

as said instruction is not pertinent to the issue, and there is no evidence whatsoever as to the assuming of any indebtedness by the Fairbanks Beverage Company of Petrie and Weber, and that it is contrary to law.

The COURT.—Exception allowed.

Mr. CLARK.—Plaintiffs except to instruction No. 15 given by the Court to the jury, as the Court invades the province of the jury and passes upon facts that should be left to the jury, virtually instructs them on questions of fact and not on questions of law, and is [151] contrary to law.

The COURT.—Exception allowed.

Mr. CLARK.—Plaintiffs except to instruction No. 16 given by the Court to the jury on the ground that it is contrary to law and invades the province of the jury.

The COURT.—Exception allowed.

Mr. CLARK.—Plaintiffs except to the refusal of the Court to give the proposed instructions submitted by plaintiffs numbered 1, 2, 3, 6, 7, 8 and 9.

The COURT.—Exceptions allowed. [152]

That the Court then and there allowed said exceptions.

That, thereafter, said jury retired to consider their verdict, and on the 2d day of April, 1923, duly

returned into court with their verdict, which was in the words and figures following, to wit: [153]

[Title of Court and Cause.]

Verdict.

We the jury, duly impaneled and sworn to try, hear and determine the issues in the above-entitled cause, do find and return a verdict in favor of the defendant and against the plaintiffs, and that defendant is entitled to recover from plaintiffs the sum of \$1,500.00 principal with interest on \$2,000.00 at the rate of one per cent per month from the 5th day of February, 1918, to the 25th day of June, 1918, together with interest at the rate of one per cent per month on \$1,500.00 from the 25th day of June, 1918, to the date of judgment, and for the sum of \$250.00 attorneys' fees.

Dated at Fairbanks, Alaska, April 2d, 1923.

F. M. DUNHAM,

Foreman.

Entered in Court Journal No. 15, page 706.

[Endorsed]: Filed Apr. 2, 1923. Rob't W. Taylor, Clerk. By Frank O'Farrell, Deputy.
[154]

That, thereafter and within the time allowed by law, the plaintiffs filed a motion for judgment notwithstanding the verdict, which was as follows, to wit: [155]

[Title of Court and Cause.]

Motion for Judgment Notwithstanding Verdict.

Come now the plaintiffs in the above-entitled action and move this Court for the entry of a judgment against the defendant and in favor of the plaintiffs in the above-entitled action, notwithstanding the verdict rendered by the jury which tried said cause on the 2d day of April, 1923, said judgment to be based on plaintiffs' second cause of action and to be for the sum of \$500.00 together with interest thereon at the rate of one per cent a month from the 25th day of June, 1918, together with an attorney's fee in such sum as to the Court shall seem reasonable.

This motion is based on the following grounds, to wit, that it conclusively appears, from the evidence in this cause and as admitted by the amended answer of defendant on file herein, that the note therein described was executed by the defendant and delivered to the plaintiff on or about the day therein specified and that said note has never been paid; that it further conclusively appears from the evidence that the note set forth in defendant's amended answer as a counterclaim and setoff against the claim of plaintiffs was absolutely without any consideration whatsoever and was void; that, from all the evidence introduced in said cause, it appears that the said defendant is [156] indebted to the plaintiffs for the amount of the note described in the second cause of action in plaintiffs'

complaint on file herein, and that there is no valid or legal setoff or counterclaim existing in behalf of or in favor of the defendant above named, and that the evidence is undisputed that there was no consideration for the note described in defendant's amended answer on file herein.

Dated at Fairbanks, Alaska, this 4th day of April, 1923.

JOHN A. CLARK,
Attorney for Plaintiffs.

[Endorsed]: Filed Apr. 4, 1922. Rob't W. Taylor, Clerk. By Grace Fisher, Deputy. [157]

That, thereafter, said Court overruled said motion, to which order plaintiffs then and there excepted, and said exception was allowed.

That, subsequent to the rendition of said verdict and within the time prescribed by law, plaintiffs filed a motion for a new trial, which was in the words and figures following, to wit: [158]

[Title of Court and Cause.]

Motion for a New Trial.

Come now the plaintiffs above named and without waiving their motion heretofore filed for a judgment in favor of plaintiffs notwithstanding the verdict of the jury in favor of the defendant and still insisting on said motion, but in the event said motion is overruled, do now move this Court for an order setting aside the verdict of the jury given, made, rendered, and entered in the above-entitled

cause on the 2d day of April, 1923, and giving and granting to those plaintiffs a new trial of said action, on the following grounds, to wit:

I.

Insufficiency of the evidence to justify the verdict and that it is against law in the following particulars, to wit:

(1) That the evidence introduced in said cause shows that there was absolutely no consideration whatsoever for the execution by David H. Cascaden of the promissory note payable to the defendant, described in defendant's amended answer, and that, by reason thereof, said promissory note is not a valid setoff or counterclaim against the plaintiffs, and for the further reason that it appears by the admissions of the pleadings and by the evidence in said cause that defendant is indebted to plaintiffs in the sum of five hundred dollars, with interest [159] thereon at the rate of one per cent a month from the 25th day of June, 1918, together with an attorney's fee to be fixed by the Court, and that the verdict rendered by the jury in said cause is against law and against the evidence introduced in said cause.

(2) On the further ground that it conclusively appears from the evidence that the promissory note described in plaintiff's first cause of action represented money, borrowed by the defendant and David Petree, and that said David H. Cascaden was not responsible or liable for any part or portion thereof; that he was compelled to pay said note; and that said note has never been repaid to him.

(3) For the further reason that it does not appear from the evidence in said cause that the Fairbanks Beverage Company ever agreed to assume, or assumed, the indebtedness of David Petree and George Weber, and it does not appear that David H. Cascaden ever accepted the Fairbanks Beverage Company as a debtor in lieu of David Petree and George Weber, or ever released said Petree and said Weber from their liability to him by reason of his being compelled to pay the promissory note described in plaintiffs' first cause of action, and it conclusively appears from the evidence that said Cascaden has never been repaid the amount he was compelled to pay to the Farmers' Bank in taking up the said note of Petree and Weber; that said note still remains unpaid and is due from defendant to plaintiffs herein; and that said verdict is contrary to law and is not justified by the evidence in said cause.

II.

Errors in law occurring at the trial and excepted to by the plaintiffs herein, as follows:

Errors committed by the Court in admitting evidence on the [160] trial of said cause, excepted to by the plaintiffs at the time, and which exceptions were allowed, to wit:

(1) The Court erred in giving certain instructions excepted to by the plaintiffs, in the presence of the jury and before they retired to consider their verdict in said cause, which said exceptions were noted by the Court, and exceptions allowed.

(2) The Court erred in giving Instruction No. 8, for the reason that said instruction is contrary to

law and the Court attempts to instruct on the facts in said cause and to decide questions of which the jury are the sole judges, and that the Court completely ignores the special defenses made by the plaintiffs in said action of lack of consideration.

(3) The Court erred in giving Instruction No. 9, as it is predicated on Instruction No. 8, the error in which is hereinabove set forth.

(4) The Court erred in submitting to the jury the question of attorney's fee, as that is a matter solely within the province of the Court.

(5) The Court erred in Instruction No. 13, prepared by plaintiffs herein, in adding thereto that part thereof which reads as follows: "Unless you find that said indebtedness of Weber and Petree was transferred to the Fairbanks Beverage Company by and with the consent of David H. Cascaden," for the reason that said addition is inconsistent with the remainder of said instruction, is contrary to law, and completely ignores the proposition that the mere acceptance of said *said* indebtedness by the Fairbanks Beverage Company would not relieve the original debtors except by the express consent of David H. Cascaden, and that the said quoted part of said instruction is indefinite and ambiguous in that indebtedness cannot be transferred from one to another without the consent of the party that is presumed to assume said indebtedness. [161]

(6) The Court erred in Instruction No. 15, in that it invaded the province of the jury and instructed on questions of fact which are solely within the province of the jury; that said instruction is

contrary to law and is a mis-statement of the law, in that it makes the acceptance of a note and mortgage by Cascaden from the Fairbanks Beverage Company conclusive evidence that he released Weber and Petree from any liability, when said fact is purely a matter for the jury to determine; the Court further invades the province of the jury when he directs the jury that the acceptance of a note and mortgage from the Beverage Company completely changed the indebtedness from Petree and Weber to the Beverage Company, ignoring the proposition that a person may take security for indebtedness from others without waiving his right to proceed against the original debtors. The Court also states in said instruction that the defendant Weber was entirely released from any obligations on account of the note set forth in plaintiffs' first cause of action when Cascaden accepted the mortgage from the Beverage Company; which is entirely a question of fact, one of the issues in said cause, made so by the pleadings, and should be determined by the jury and no one else; and said instruction was in effect an instruction on the evidence in the cause, and completely disregarded the issues raised by the pleadings in said cause.

(7) The Court erred in giving Instruction No. 16, in that he invaded the province of the jury in attempting to pass on questions of fact, for the reason that the question as to whether or not said note was accepted from the Beverage Company as additional security to the note already held by Cascaden and by him paid to the Farmers' Bank,

is purely a question of fact that should be left to the jury for their consideration.

(8) The Court erred in giving Instruction No. 17, in that [162] the question of attorney's fee was not submitted to the jury and should not have been considered by them, as the amount of attorney's fee should be determined by the Court and no one else.

(9) The Court erred in refusing to give proposed Instruction No. 1 submitted by plaintiffs.

(10) The Court erred in refusing to give proposed Instruction No. 2 submitted by plaintiffs.

(11) The Court erred in adding to proposed Instruction No. 4 submitted by plaintiffs, said addition being contained in Instruction No. 13.

(12) The Court erred in refusing to give proposed instruction No. 6 submitted by plaintiffs, as that was one of the issues raised by said pleadings and the jury should have been instructed on said proposition.

(13) The Court erred in refusing to give proposed Instruction No. 7 submitted by plaintiffs, as it is a correct statement of the law and one of the issues in said cause.

(14) The Court erred in refusing to give proposed Instruction No. 8 submitted by plaintiffs, in that it is absolutely within the issues in said cause, made so by the pleadings, and the plaintiffs were entitled to have the jury instructed thereon.

(15) The Court erred in refusing to give proposed Instruction No. 9 submitted by plaintiffs, for the reason that it is an instruction on the issues involved in said cause and the plaintiffs are entitled

to have said matter submitted to the jury for their determination.

(16) The Court erred in practically directing a verdict in favor of defendant and against plaintiffs, on plaintiffs' counterclaim in said cause, as said action was not justified by the law or the evidence.

(17) The Court erred in practically instructing the jury to find against plaintiffs on their first cause of action, for [163] the reason that said instruction was not justified by the evidence and was contrary to law.

(18) The Court erred in not sustaining plaintiffs' exceptions to instructions given, said objections being made to the Court and noted by the reporter in the presence of the jury prior to the time said cause was given to the jury for their consideration.

(19) The Court erred in overruling and refusing plaintiffs' motion for a directed verdict, filed at the close of all the evidence in said cause and before the arguments.

(20) The Court erred in refusing to permit plaintiffs to file a second amended reply to conform to the proofs adduced in said cause.

III.

Upon the ground that plaintiffs were prevented from having a fair trial by reason of the instructions given by the Court, which ignored the defenses interposed by plaintiffs to the counterclaim of the defendant and by the acts of the Court in instructing on facts and invading the province of the jury.

Dated at Fairbanks, Alaska, this 4th day of April 1923.

JOHN A. CLARK,
Attorney for Plaintiffs.

[Endorsed]: Filed April 4, 1923. Rob't W. Taylor, Clerk. By Grace Fisher, Deputy. [164]

That, thereafter and after argument, the Court overruled said motion for a new trial, to which order plaintiffs then and there excepted, and said exception was allowed.

And now, in furtherance of justice and that right may be done, the plaintiffs, within the time allowed by law and the orders of this Court, extending plaintiffs' time within which to prepare, serve, and file their bill of exceptions in this cause, herewith present the foregoing bill of exceptions in the above-entitled cause, and pray that it may be settled, signed, and allowed by the Judge of this Court, in the manner prescribed by law.

JOHN A. CLARK,
Attorney for Plaintiffs.

Due service of the within and foregoing bill of exceptions admitted this 10th day of May, A. D. one thousand nine hundred twenty-three.

R. F. ROTH,
J. E. RYDEN,
Attorneys for Defendant. [165]

United States of America,
Territory of Alaska,—ss.

Certificate to Bill of Exceptions.

I hereby certify that the above and foregoing contains a full, true, and accurate transcript of all the oral testimony and documentary evidence introduced at the trial of the above-entitled action, upon the issues joined between the plaintiffs above named and the defendant above named, as well as the complete charge of the Court to the jury; that it includes all exceptions taken throughout the trial to the admission and rejection of evidence, also the exceptions taken to the instructions of the Court to the jury, the exceptions to the refusal of the Court to give certain special instructions tendered by plaintiffs, as set forth in said bill of exceptions, the motion for a new trial, and all other matters and things occurring thereat, and not otherwise of record;

And I now sign, seal, and allow the same as and for a true and correct bill of exceptions of all matters contained therein, and order the same to be refiled by the clerk of this Court, and when so filed to be and become a part of the record in this cause.

Dated at Fairbanks, Alaska, on this, the fourth day of June, A. D. one thousand nine hundred twenty-three.

CECIL H. CLEGG,
District Judge.

Entered in Court Journal No. 15, page 753.

[Endorsed]: Lodged May 10, 1923. Rob't. W. Taylor, Clerk. By Frank O'Farrell, Deputy. Jun. 4, 1923, Rob't. W. Taylor, Clerk. By Grace Fisher, Deputy. [166]

[Title of Court and Cause.]

Judgment on Verdict.

On the 31st day of March, 1923, this action came on regularly for trial. The said parties appeared by their attorneys. A jury of twelve persons were regularly empaneled and sworn to try said action. Witnesses on the part of plaintiffs and defendant were sworn and examined. After hearing evidence, the argument of counsel and instructions of the Court, the jury retired to consider their verdict, and subsequently, on the 2d day of April, 1923, returned into court and, being called, answered to their names and say they find a verdict for the defendant.

WHEREFORE, by virtue of the law and by reason of the premises aforesaid,

IT IS ORDERED AND ADJUDGED that said defendant have and recover from said plaintiffs the sum of \$1500.00 principal, together with interest on \$2000.00 from the 5th day of February, 1918, to the 25th day of June, 1918, at the rate of one per cent per month, together with interest on \$1500.00 at the rate of one per cent per month from the 25th day of June, 1918, to the 31st day of March, 1923, together with [167] said defendant's costs and disbursements incurred in this action taxed at the sum of \$29.60.

Judgment rendered April 11, 1923.

Dated at Fairbanks, Alaska, this 18th day of April, 1923.

CECIL H. CLEGG,
District Judge.

Entered in Court Journal No. 15, page 725.

[Endorsed]: Filed Apr. 18, 1923. Rob't. W. Taylor, Clerk. By Grace Fisher, Deputy. [168]

[Title of Court and Cause.]

Assignment of Error.

Come now the plaintiffs in the above-entitled cause, being the plaintiffs in error, and assign the following error as having been committed by the above-named Court on the trial of the above-entitled cause, which said error said plaintiffs intend to, and do, rely upon on plaintiffs' writ of error to be prosecuted to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, State of California.

Pleadings and Procedure.

(1) The Court erred in refusing to direct the jury engaged in the trial of the above-entitled cause to bring in a verdict in favor of the plaintiffs upon plaintiffs' second cause of action set forth in their complaint on file herein, said motion being made after all the evidence had been introduced in said cause, which said motion was in writing and duly filed in said cause and is a part of the records thereof.

Plaintiffs' Exception No. 1.

(2) 'The Court erred, at the conclusion of the

trial of said cause and before the argument of counsel, in refusing to permit plaintiffs to file a second amended reply to conform to the proof adduced on the trial of said cause, in the following particulars, to wit: [169]

(a) To amend paragraph III of the first amended reply by changing the wording of section 2 of said paragraph to read as follows: "Replying to paragraph 2 thereof, plaintiffs admit that no part of said promissory note or interest has been paid by plaintiff David H. Cascaden, but deny each and every other matter and thing therein contained."

(b) To amend paragraph IV of said first amended reply so as to set forth therein that the promissory note described in defendant's affirmative answer was, so far as David H. Cascaden was concerned, without consideration, and that plaintiff David H. Cascaden never was, nor is now, liable to the defendant in any sum whatsoever by reason of the making of said note.

(c) To amend section 3 of paragraph V of said first amended reply by adding thereto the following: "That said David H. Cascaden was not liable or responsible for any part or portion of said balance due to said Allberg, and was not under any legal or other obligation to sign said note, and there was no consideration for the signing thereof by said David H. Cascaden."

Plaintiffs' Exception No. 2.

(3) The Court erred in overruling plaintiff's motion to enter a judgment in favor of said plain-

tiffs on their second cause of action set forth in their complaint on file herein notwithstanding the verdict of the jury and in refusing to enter same.

Plaintiffs' Exception No. 3.

(4) The Court erred in overruling plaintiffs' motion for a new trial and in refusing to grant a new trial.

Plaintiffs' Exception No. 4.

(5) The Court erred in entering any judgment in favor of the defendant on the general verdict rendered by said jury and in overruling plaintiffs' objection to the entry of any judgment [170] in favor of the defendant on the verdict so rendered.

Plaintiffs' Exception No. 5.

Exceptions to Instructions Given and Refused.

(6) The Court erred in refusing to instruct the jury and in overruling plaintiffs' motion to give to the jury plaintiffs' proposed Instruction No. 1, which is as follows:

"You are instructed that the defendant admits in his pleadings the making, execution, and delivery of the promissory note described in plaintiffs' second cause of action, and unless you are satisfied that the defendant has proved, by a preponderance of evidence, that David H. Cascaden, together with Dave Petree, is indebted to defendant on the promissory note described in defendant's answer, your verdict must be for the plaintiffs on their second cause of action set forth in their complaint."

Plaintiffs' Exception No. 6.

(7) The Court erred in refusing to instruct the jury and in overruling plaintiffs' motion to give to the jury plaintiffs' proposed Instruction No. 2, which is as follows:

“You are instructed that, in the first instance, the plaintiffs were obliged to prove the allegations of their complaint by preponderance of evidence, and when that was done, then the burden shifted to the defendant to disprove plaintiffs' case and to prove the affirmative matter set forth in his answer by a preponderance of evidence, and that, so far as the counterclaim set forth in defendant's answer is concerned, he becomes the plaintiff and the burden of proof shifts to him, and he must prove the allegations of said answer as regards the counterclaim by a preponderance of evidence.”

Plaintiffs' Exception No. 7.

(8) The Court erred in adding to plaintiffs' proposed Instruction No. 4, which is the Court's Instruction No. 13, the limitation hereinafter set forth, said proposed instruction being as follows:

“You are further instructed that, if one of the signers of a note is compelled to pay the whole note, any or all of the other signers of the note are liable for the repayment to the party who paid the note of the amount that was paid on the note over and above what was for the personal use or benefit of the person who paid the note, and if you are satisfied, by

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a fair preponderance of evidence, that no part of the money represented by the \$3,000.00 note given to the Farmers' Bank of Fairbanks was for the use and benefit of David H. Cascaden, then you are instructed that the defendant [171] would be liable to David H. Cascaden and to his Guardian for the entire amount that said David H. Cascaden was compelled to pay to the Farmers' Bank of Fairbanks."

To which the Court, on its own motion, added the following:

"Unless you find that said indebtedness of Weber and Petree was transferred to the Fairbanks Beverage Company by and with the consent of said David H. Cascaden."

Plaintiffs' Exception No. 8.

(9) The Court erred in refusing to instruct the jury and in overruling plaintiffs' motion to give to the jury plaintiffs' proposed Instruction No. 6, which was as follows:

"You are instructed that the plaintiffs in this action claim that the note for \$2,000.00 given by David Petree and David H. Cascaden to George Weber, was given to protect the defendant from loss if he was compelled to pay to one Allberg the sum of \$3,000.00 alleged to have been due to said Allberg, and if you are satisfied from the evidence that that was the purpose for which said note was given, then you are instructed that, if said Weber did not pay said Allberg the sum of \$3,000.00, then said note was without consideration, and

neither of the makers thereof would be liable to said Weber for any part thereof. And if you are satisfied that said note was given for the purpose above set forth, then the burden is on the defendant to show that said payment was made to said Allberg, or someone for his use and benefit, prior to the time of the filing of defendant's amended answer in this cause."

Plaintiffs' Exception No. 9.

(10) The Court erred in refusing to instruct the jury and in overruling plaintiffs' motion to give to the jury plaintiffs' proposed Instruction No. 7, which is as follows:

"You are instructed that there must be a good and valuable consideration for every contract or said contract can not be enforced, and you are further instructed that, if the consideration for a contract is the performance by the person for whose benefit said contract is made of some act in the future, and he fails to perform said act or acts, then the consideration for said contract is said to have failed and said contract can not be enforced."

Plaintiffs' Exception No. 10.

(11) The Court erred in refusing to instruct the jury and in overruling plaintiff's motion to give to the jury plaintiffs' proposed Instruction No. 8, which is as follows:

"The plaintiffs have pleaded, in their amended reply on file herein, that the note described in defendant's amended answer was,

and is, without consideration, and you are instructed that, if you find from the evidence that, [172] at the time David H. Cascaden signed said note, he was not indebted to George Weber and was under no obligation to execute said note, then you should find against the defendant on his counterclaim."

Plaintiffs' Exception No. 11.

(12) The Court erred in refusing to instruct the jury and in overruling plaintiff's motion to give to the jury plaintiffs' proposed Instruction No. 9, which is as follows:

"You are instructed that one of the issues in this cause is as to whether or not there was a good and valuable consideration for the note described in defendant's amended answer, the plaintiffs herein having denied that there was any consideration for said note so far as David H. Cascaden is concerned, and, under the rules of evidence, the burden is placed upon the defendant to prove, by a preponderance of the evidence, that there was a good and valuable consideration for the signing of said note by David H. Cascaden, and if the defendant fails to prove said consideration, by a fair preponderance of evidence, then he can not prevail upon his counterclaim set forth in his amended answer, and your verdict must be against said defendant on said counterclaim."

Plaintiffs' Exception No. 12.

(13) The Court erred in giving to the jury its Instruction No. 8, which was as follows:

“You are instructed that the defendant George Weber, as a counterclaim, claims that that plaintiff David H. Cascaden is indebted to him in the sum of \$2,000.00, together with interest thereon, on a promissory note signed by David H. Cascaden, plaintiff in this case, and David Petree, dated February 5, 1918, less the sum of \$500.00, with interest, on a promissory note given to David H. Cascaden by defendant George Weber on the 25th day of June, 1918, which last mentioned note for \$500.00 is set up as the second cause of action in plaintiffs’ complaint. And you are instructed that there being no competent evidence introduced by the plaintiff in opposition to said claim, the Court now instructs you that you should find for the defendant George Weber with reference to said counterclaim: that is to say, for the sum of \$1500.00 principal, with interest on the sum of \$2000.00 at the rate of one per cent per month from the 5th day of February, 1918, to the 25th day of June, 1918, together with interest at the rate of one per cent per month on the sum of \$1500.00 from the 25th day of June, 1918, to this date; and also for such further sum as you deem reasonable for attorney’s fees.”

and in overruling plaintiffs’ objection thereto, which was as follows:

“Plaintiffs except to Instruction No. 8 given by the Court to the jury, on the ground that the Court takes the [173] matter entirely

out of the hands of the jury and passes upon matters of fact that should be passed upon by the jury, and that it is contrary to law.”

Plaintiffs' Exception No. 13.

(14) The Court erred in giving to the jury its Instruction No. 9, which was as follows:

“You are instructed that by reason of the foregoing instruction there is left for your consideration to be determined by you whether or not the plaintiff could prevail as to the first cause of action set forth in the complaint, in which the plaintiff alleges that the defendant George Weber is indebted to plaintiff in the sum of \$3000.00 and interest on a certain promissory note dated the 31st day of October, 1917, which is set forth in paragraph 4 of plaintiff's complaint, and which it is alleged that the plaintiff David H. Cascaden paid on the 25th day of June, 1918, in full, together with \$30.00 interest thereon, and which it is alleged that the defendant Weber has not repaid to the plaintiff, and that the whole of said sum of \$3,030.00 with interest at the rate of one per cent per month from the 25th day of June, 1918, is now due and unpaid; and also for the sum of \$600.00 attorney's fee in instituting and conducting this litigation with reference to this first cause of action; and also for the sum of \$150.00 for instituting and maintaining the litigation with reference to plaintiff's second cause of action on the note for \$500.00, with interest, the principal of which

said note and interest is admitted by the defendant to be due to the plaintiff.” and in overruling plaintiffs’ objection thereto, which was as follows:

“Plaintiffs except to Instruction No. 9 given by the Court to the jury, for the reason that it is predicated upon the eighth instruction, to which we have heretofore excepted, in that it limits the findings of the jury simply to matters contained in plaintiffs’ complaint, having already instructed the jury to bring in a verdict in favor of the defendant upon his counterclaim.”

Plaintiffs’ Exception No. 14.

(15) The Court erred in giving to the jury its Instruction No. 13, which was as follows:

“You are further instructed that if one of the signers of a note is compelled to pay the whole note, any or all the other signers of the note are liable for the repayment to the party who paid the note of the amount that was paid on the note over and above what was for the personal use or benefit of the person who paid the note; and if you are satisfied by a fair preponderance of evidence that no part of the money represented by the \$3000.00 note given to the Farmers’ Bank of Fairbanks was for the use and benefit of David H. Cascaden, then you are instructed that the defendant would be liable to David H. Cascaden and to his guardian for the entire amount that said David H. Cascaden was compelled to pay to the

Farmers' Bank of Fairbanks, unless you [174] find that said indebtedness of Weber and Petree was transferred to the Fairbanks Beverage Company by and with the consent of said David H. Cascaden."

and in overruling plaintiff's objection thereto, which was as follows:

"Plaintiffs except to the last portion of Instruction No. 13 given by the Court to the jury, wherein it is recited as follows: 'Unless you find that said indebtedness of Weber and Petree was transferred to the Fairbanks Beverage Company by and with the consent of said David H. Cascaden,' as said instruction is not pertinent to the issue, and there is no evidence whatsoever as to the assuming of any indebtedness by the Fairbanks Beverage Company of Petree and Weber, and that it is contrary to law."

Plaintiffs' Exception No. 15.

(16) The Court erred in giving to the jury its Instruction No. 15, which was as follows:

"You are instructed that if David H. Cascaden paid the note set forth in plaintiff's first cause of action to the Farmers' Bank of Fairbanks and took a note for \$3033.00 and a mortgage from the Fairbanks Beverage Company, this act on the part of Cascaden constituted a payment of the promissory note set forth in plaintiff's first cause of action; and the question as to whether or not the mortgage so taken was a first or second mortgage

is immaterial, and also as to whether or not said note of \$3033.00 was or was not paid by the Fairbanks Beverage Company is immaterial, because the debt was changed by the aforesaid transaction from David Petree and defendant to the Fairbanks Beverage Company by express agreement with plaintiff Cascaden; and in that event the defendant Weber was released entirely from any obligations on account of said note set forth in plaintiff's first cause of action, and the said Cascaden can look only to the Fairbanks Beverage Company for payment of the said note for \$3033.00, and the defendant Weber would not be responsible for the payment of the same, or any part thereof, and your verdict should be for the defendant on plaintiff's first cause of action."

and in overruling plaintiffs' objection thereto, which was as follows:

"Plaintiffs except to Instruction No. 15 given by the Court to the jury, as the Court invades the province of the jury and passes upon facts that should be left to the jury, virtually instructs them on questions of fact and not on questions of law, and is contrary to law."

Plaintiffs' Exception No. 16.

(17) The Court erred in giving to the jury its Instruction No. 16, which was as follows:

"You are instructed that there is no evidence in this [175] case whatever that would tend to prove that the note for \$3033.00, executed by the Fairbanks Beverage Company in

favor of plaintiff David H. Cascaden, was given as additional security for the payment of said promissory note marked Plaintiff's Exhibit 'A'; and there is nothing contained in the complaint of plaintiffs by which competent evidence could be introduced to show that said note for \$3033.00, executed by the Fairbanks Beverage Company to the plaintiff David H. Cascaden, was given as additional security for the payment of said note of \$3000.00, marked Plaintiff's Exhibit 'A'; and the jury are therefore instructed that they would not be warranted in considering said note of \$3033.00 as additional security for the payment of said promissory note marked Plaintiff's Exhibit 'A.' "

and in overruling plaintiff's objection thereto, which was as follows:

"Plaintiffs except to Instruction No. 16 given by the Court to the jury, on the ground that it is contrary to law and invades the province of the jury."

Plaintiffs' Exception No. 17.

(18) The Court erred in refusing to give to the jury the plaintiffs' proposed instructions numbered 1, 2, 3, 6, 7, 8, and 9, as hereinabove set forth, and in overruling plaintiffs' objection to said refusal to do so, said objection being as follows:

"Plaintiffs except to the refusal of the Court to give the proposed instructions submitted by plaintiffs, numbered 1, 2, 3, 6, 7, 8, and 9."

Plaintiffs' Exception No. 18.

JOHN A. CLARK,

Attorney for Plaintiffs and Plaintiffs in Error.

Due service of the foregoing assignment of errors and receipt of copy thereof acknowledged this 21st day of July, 1923.

R. F. ROTH,

Attorney for Defendant.

[Endorsed]: Filed Jul. 21, 1923. Robt. W. Taylor, Clerk. By Grace Fisher, Deputy. [176]

[Title of Court and Cause.]

Petition for Writ of Error.

David H. Cascaden and Blanche Cascaden as guardian of the estate of David H. Cascaden, an insane person, plaintiffs in the above-entitled action, feeling themselves aggrieved by the verdict of the jury rendered herein on the 2d day of April, 1923, and the judgment of the Court made and entered herein, in pursuance of said verdict, on the 18th day of April, 1923, against the plaintiffs herein for the sum of \$1,500.00 and interest in sum of \$951.33 and for costs of suit, now comes John A. Clark, attorney for plaintiffs, and petitions this honorable Court for an order allowing said plaintiffs to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, according to the laws in that behalf made and provided; now, therefore, said plaintiffs' petition that an order be made fixing the amount of the security which shall

be given and furnished on said writ of error, to cover the costs incurred herein in said review, and for an order fixing Seattle, in the State of Washington, as the place for hearing said writ of error, and for such other orders and process as may cause same to be corrected by said United States Circuit Court of Appeals for the Ninth Circuit. [177]

And your petitioners will ever pray.

JOHN A. CLARK,
Attorney for Plaintiffs.

Due service of the foregoing petition for writ of error admitted this 21st day of July, 1923.

R. F. ROTH,
Attorney for Defendant.

[Endorsed]: Filed Jul. 21, 1923. Rob't W. Taylor, Clerk. By Grace Fisher, Deputy. [177]

[Title of Court and Cause.]

Suggestion of Death and Petition.

To the Honorable the above-entitled Court and to the Defendant and his attorney:

Comes now Blanche Cascaden, administratrix of the estate of David H. Cascaden, deceased, and represents to the Court that, since the trial of the above-entitled action, David H. Cascaden, then under guardianship as an insane person, has died, and your petitioner herein has been appointed as administratrix of his estate;

Wherefore, your petitioner prays that she, as such administratrix, be substituted as party plain-

tiff in the above-entitled action in lieu of the plaintiffs therein described, and for an order reviving said action in favor of petitioner herein as such administratrix.

BLANCHE CASCADEN,
Petitioner.

JOHN A. CLARK,
Attorney for Petitioner.

United States of America,
Territory of Alaska,—ss.

Blanche Cascaden, being first duly sworn, on oath deposes and says: I am the petitioner above named; I have read the foregoing petition; know the contents thereof; and the matters and things therein set forth are true, as I verily believe.

BLANCHE CASCADEN.

Subscribed and sworn to before me, this 20th day of July, 1923.

[Seal]

JOHN A. CLARK,
Notary Public for Alaska.

Com. exp. 4/24/26.

[Endorsed]: Filed Jul. 21, 1923. Rob't W. Taylor, Clerk. By Grace Fisher, Deputy. [179]

[Title of Court and Cause.]

Order for Substitution.

This matter coming on for hearing on the application of Blanche Cascaden, administratrix of the estate of David H. Cascaden, deceased, for an order

substituting her, as such administratrix, as party plaintiff in the above-entitled action, in place of herself as guardian of the estate of David H. Cascaden, an insane person, and David H. Cascaden, and it appearing to this Court that, since the trial of the above-entitled action, the said David H. Cascaden has died, and that Blanche Cascaden has been appointed as administratrix of his estate and has entered on the discharge of her duties as such, and the Court being fully advised in the premises;

It is ordered that the above-entitled action be, and it is, hereby revived in favor of the estate of David H. Cascaden, deceased, and that said Blanche Cascaden, as administratrix of the estate of David H. Cascaden, deceased, be, and she is, hereby substituted in lieu of the plaintiffs in said action as originally instituted.

Dated at Fairbanks, Alaska, this 21st day of July, 1923.

CECIL H. CLEGG,
District Judge.

Entered in Court Journal No. 15, page 768.

[Endorsed]: Filed Jul. 21, 1923. Rob't W. Taylor, Clerk. By Grace Fisher, Deputy. [180]

[Title of Court and Cause.]

**Order Allowing Writ of Error and Fixing Amount
of Cost Bond.**

Whereas David H. Cascaden and Blanche Cascaden as guardian of the estate of David H. Cas-

caden, an insane person, have heretofore and on this day petitioned this Court for a writ of error from the decision and judgment against them made and entered herein, as described in said petition, to the United States Circuit Court of Appeals for the Ninth Circuit, together with an assignment of errors, within due time, and praying that an order be made, fixing the amount of the security which the said plaintiffs and plaintiffs in error should give to the Government of the United States upon said writ of error, and also designating the place where said writ of error should be heard, and said petition having on this day been duly allowed, and

Whereas, subsequent to said time, Blanche Cascaden as administratrix of the estate of David H. Cascaden, deceased, filed herein a suggestion of death of said David H. Cascaden, since the rendition of the judgment complained of in said cause, and petitioned for an order of revival in said action, in her favor as such administratrix, and this Court having thereafter duly made and entered an order reviving said action in favor of said Blanche Cascaden as administratrix of the estate of David H. Cascaden, deceased, and directing that she, as such administratrix, be substituted as plaintiff in said action in lieu of the [181] original plaintiffs therein named;

Now, therefore, it is ordered that said writ of error be granted, and that the place of said review shall be Seattle, in the State of Washington, and that said plaintiff and plaintiff in error shall file in this Court a bond in the sum of \$300.00, to be ap-

proved by the Judge of this Court, to the effect that, if the said plaintiff and plaintiff in error shall prosecute the said writ of error to effect and answer and pay all costs if she fail to make good her said plea, then said obligation shall be void, otherwise to remain in full force, effect, and virtue.

Dated at Fairbanks, Alaska, on this, the 21st day of July A. D. one thousand nine hundred twenty-three.

CECIL H. CLEGG,
District Judge.

Due service and receipt of copy hereof acknowledged this 21st day of July, 1923.

R. F. ROTH,
Attorney for Defendant.

Entered in Court Journal No. 15, page 768.

[Endorsed]: Filed Jul. 21, 1923. Rob't W. Taylor, Clerk. By Grace Fisher, Deputy. [182]

[Title of Court and Cause.]

Bond On Writ of Error.

Know all men by these presents that we, Blanche Cascaden as administratrix of the estate of David H. Cascaden, deceased, plaintiff and plaintiff in error, as principal, and J. C. Kinney and John A. McIntosh as securities, are held and firmly bound unto the defendant and defendant in error, George Weber, in the just and full sum of \$300.00, to be paid to said defendant in error, which payment, well and truly to be made, we bind ourselves, our

successors in interest and assigns, jointly and severally firmly by these presents.

Sealed with our seals and dated this 21st day of July, 1923.

Whereas the above named Blanche Cascaden, as administratrix of the estate of David H. Cascaden, deceased, has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to review the judgment in the above-entitled cause made and entered by the District Court for the Fourth Judicial Division of the Territory of Alaska;

Now, therefore, the condition of this obligation is such that, if the above named Blanche Cascaden as administratrix of the estate of David H. Cascaden, deceased, plaintiff in error, shall prosecute said writ of error to effect and answer and pay all costs if she shall fail to make good her said plea, then this obligation shall be void, otherwise to remain in full force, effect, and virtue. [183]

BLANCHE CASCADEN,

As Administratrix of the Estate of David H. Cascaden, Deceased,

Principal.

J. C. KINNEY,

JOHN A. McINTOSH,

Sureties.

United States of America,
Territory of Alaska,—ss.

J. C. Kinney and John A. McIntosh, being first duly sworn according to law, on oath depose and say, each for himself and not one for the other: I

am one of the sureties on the foregoing bond; I am not an attorney or counselor at law, marshal, clerk, commissioner, or other officer of any court; I am worth the sum of \$300.00, over and above all my just debts and liabilities, in property not exempt from execution, situate in the Territory of Alaska.

J. C. KINNEY,

JOHN A McINTOSH.

Subscribed and sworn to before me on this 21st day of July, A. D. 1923.

[Seal]

JOHN A. CLARK,

Notary Public in and for the Territory of Alaska.

My commission expires 24 April, 1926.

The foregoing bond is hereby approved.

CECIL H. CLEGG,

District Judge.

[Endorsed]: Filed Jul. 21, 1923. Rob't W. Taylor, Clerk. By Grace Fisher, Deputy. [184]

[Title of Court and Cause.]

Writ of Error.

The President of the United States of America to the Honorable Cecil H. Clegg, Judge of the United States District Court for the Territory of Alaska, Fourth Judicial Division, GREETING:

Because, in the records and proceedings, as also in the rendition of a judgment, dated the 18th of April, A. D. one thousand nine hundred twenty-three, of a plea which is, in the said United States

District Court for the Territory of Alaska, Fourth Judicial Division, before you, between David H. Cascaden and Blanche Cascaden as guardian of the estate of David H. Cascaden, an insane person, as plaintiffs and George Weber, as defendant, manifest error hath happened, to the great prejudice and damage of the said David H. Cascaden and Blanche Cascaden as guardian of the estate of David H. Cascaden, an insane person, and to Blanche Cascaden as administratrix of the estate of David H. Cascaden, deceased, substituted plaintiff in said cause, as is said and appears in the petition filed herein;

We, being willing that error, if any hath been, shall be duly corrected and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if said judgment be therein given, then, under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, [185] State of California, together with this writ, so as to have the same at said place, in said Circuit Court, on the 21st day of August, A. D. one thousand nine hundred twenty-three, that, the records and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals for the Ninth Circuit may cause further to be done therein, to correct such error, what of right and according to the laws and customs of the United States of America should be done.

ATTEST my hand and the seal of the United States District Court for the Territory of Alaska, Fourth Judicial Division, at the Clerk's office in the Town of Fairbanks, Alaska, on this, the 21st day of July, A. D. one thousand nine hundred twenty-three.

Allowed this 21st day of July, A. D. 1923.

Due service of the foregoing writ of error and receipt of copy thereof acknowledged this 21st day of July, A. D. 1923.

R. F. ROTH,
Attorney for Defendant in Error.

Filed Jul. 21, 1923. Rob't W. Taylor, Clerk.
By Grace Fisher, Deputy. [186]

[Title of Court and Cause.]

Citation on Writ of Error.

The President of the United States of America to
George Weber, Defendant in Error, Above
Named, and to R. F. Roth, His Attorney,
GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City and County of San Francisco, State of California, within thirty days from the date of this citation, pursuant to the writ of error filed in the office of the clerk of the United States District Court for the Territory of Alaska, Fourth Judicial Division, wherein Blanche Cascaden as administratrix of the estate of David H. Cascaden, deceased (substituted plaintiff for David H. Cascaden and Blanche Cascaden, as Guardian of the Estate of David H. Cascaden, an insane person,) is plaintiff in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in error in that behalf.

WITNESS the Honorable WILLIAM H. TAFT, Chief Justice of the Supreme Court of the United States, this twenty-first day of July, A. D. one thousand nine hundred twenty-three, and in the year of our Independence the one hundred forty-seventh.

ATTEST my hand and the seal of the United States District Court for the Territory of Alaska,

Fourth Judicial Division, at [187] Fairbanks, Alaska, on this the twenty-first day of July, A. D. one thousand nine hundred twenty-three.

[Seal]

CECIL H. CLEGG,

District Judge.

Due service of the foregoing citation and receipt of copy thereof acknowledged this 21st day of July, 1923.

R. F. ROTH,

Attorney for Defendant in Error.

Filed Jul. 21, 1923. Robt. W. Taylor, Clerk. By Grace Fisher, Deputy. [188]

[Title of Court and Cause.]

Order Extending Time to and Including September 21, 1923, to File Record and Docket Cause.

This matter coming on for hearing on the application of the plaintiff in error for an extension of time within which to have the record on writ of error in the above-entitled cause docketed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, State of California, from the twenty-first day of August, A. D. one thousand nine hundred twenty-three, to the twenty-first day of September, A. D. one thousand nine hundred twenty-three, and it appearing to this Court that, by reason of the length of time required by the mails to go from Fairbanks, Alaska, to San Francisco, California, and delay that may be occasioned by the clerk of this Court having to make up said record, the time allowed by law for

filing and docketing said record in the Circuit Court of Appeals at San Francisco is insufficient, and that the additional time prayed for is not unreasonable, and the Court being fully advised in the premises;

It is ordered that the plaintiff in error in the above-entitled cause be, and she is, hereby given and granted an additional thirty days, within which to prepare, file, and have docketed said cause in the office of the clerk of said Circuit Court of Appeals for the Ninth Circuit at San Francisco, State of California, and that she be, and is, hereby given until and including the twenty-first day of September, A. D. one thousand [189] nine hundred twenty-three, to file said record on appeal with the clerk of the said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, State of California;

And be it further ordered that this order be, by the clerk of this Court, forwarded to the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, State of California, together with the record in said cause.

Dated at Fairbanks, Alaska, on this, the twenty-first day of July, A. D. one thousand nine hundred twenty-three.

[Seal]

CECIL H. CLEGG,

District Judge.

Entered in Court Journal No. 15, page 769.

Filed Jul. 21, 1923. Robt. W. Taylor, Clerk. By Grace Fisher, Deputy. [190]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Territory of Alaska,
Fourth Division,—ss.

I, Rob't W. Taylor, Clerk of the District Court, Territory of Alaska, Fourth Division, do hereby certify that the foregoing, consisting of one hundred ninety-one pages, numbered from 1 to 191, inclusive, constitutes a full, true, and correct transcript of the record on writ of error in cause No. 2579, entitled, *Blanche Cascaden*, as Administratrix of the Estate of David H. Cascaden, deceased, plaintiff and plaintiff in error, vs. George Weber, defendant and defendant in error, and was made pursuant to and in accordance with the praecipe of the plaintiff in error filed in this action, and made a part of this transcript, and by virtue of the writ of error and citation issued in said cause, and is the return thereof in accordance therewith, and I certify that the writ of error, citation on writ of error, order enlarging return day and stipulation relative to printing record, annexed hereto, are the originals thereof.

And I do further certify that the index thereof, consisting of pages numbered i to ii, is a correct index of said Transcript of Record; also that the cost of preparing said transcript and this certificate, amounting to Seventy & 55/100 Dollars (\$70.55), has been paid to me by counsel for Plaintiff in Error in this action.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of this court this 21st day of August, A. D. 1923.

[Seal] ROBT W. TAYLOR,
Clerk, District Court for the Fourth Division of
Alaska.

By Grace Fisher,
Chief Deputy Clerk. [191]

[Endorsed]: No. 4093. United States Circuit Court of Appeals for the Ninth Circuit. Blanche Cascaden, as Administratrix of the Estate of David H. Cascaden, Deceased (Substituted Plaintiff for David H. Cascaden and Blanche Cascaden, as Guardian of the Estate of David H. Cascaden, an Insane Person), Plaintiff in Error, vs. George Weber, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Territory of Alaska, 4th Division.

Filed September 7, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

BLANCHE CASCADEN, as Administratrix of the
Estate of DAVID H. CASCADEN, Deceased,
(Substituted Plaintiff for DAVID H. CAS-
CADEN and BLANCHE CASCADEN, as
Guardian of the Estate of David H. Cascaden,
an Insane Person,

Plaintiff in Error,

vs.

GEORGE WEBER,

Defendant in Error.

UPON WRIT OF ERROR TO THE DISTRICT
COURT FOR THE TERRITORY OF
ALASKA, FOURTH DIVISION.

Brief of Plaintiff in Error

JOHN A. CLARK,
Fairbanks, Alaska, and
LYONS & ORTON,
920 Alaska Bldg., Seattle, Wash.,
Attorneys for Plaintiff in Error.

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

BLANCHE CASCADEN, as Administratrix of the
Estate of DAVID H. CASCADEN, Deceased,
(Substituted Plaintiff for DAVID H. CAS-
CADEN and BLANCHE CASCADEN, as
Guardian of the Estate of David H. Cascaden,
an Insane Person,

Plaintiff in Error,

vs.

GEORGE WEBER,

Defendant in Error.

UPON WRIT OF ERROR TO THE DISTRICT
COURT FOR THE TERRITORY OF
ALASKA, FOURTH DIVISION.

Brief of Plaintiff in Error

JOHN A. CLARK,
Fairbanks, Alaska, and
LYONS & ORTON,
920 Alaska Bldg., Seattle, Wash.,
Attorneys for Plaintiff in Error.



IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

BLANCHE CASCADEN, as Administratrix of the
Estate of DAVID H. CASCADEN, Deceased,
(Substituted Plaintiff for DAVID H. CAS-
CADEN and BLANCHE CASCADEN, as
Guardian of the Estate of David H. Cascaden,
an Insane Person,

Plaintiff in Error,

vs.

GEORGE WEBER,

Defendant in Error.

UPON WRIT OF ERROR TO THE DISTRICT
COURT FOR THE TERRITORY OF
ALASKA, FOURTH DIVISION.

Brief of Plaintiff in Error

STATEMENT OF THE CASE.

This action was brought for the recovery of the amount of two promissory notes, one for the sum of \$3,000.00, dated October 31, 1917, due six months after date, and the other for \$500.00, dated June 25, 1918, due six months after date. The first note was originally made and delivered to the Farmers Bank

of Fairbanks by the defendant in error and one David Petree. Thereafter, when that note matured, the makers were unable to pay the same, and the payee agreed to extend the time of payment for a period of sixty days if the plaintiff in error would sign the same, and the plaintiff in error did sign the note as surety, and the time for payment was so extended by the payee (Tr. 28 and 29). The plaintiff in error thereafter paid the note, which fact is admitted in the amended answer (Tr. 11). The defendant in error admits the execution, delivery and non-payment of the \$500.00 note. He contends, however, that the \$3,000.00 note was paid by the execution and delivery of a promissory note for \$3,033.00 by the Fairbanks Beverage Company, Inc., to the plaintiff in error (Tr. 12 and 13). But the latter note was given the plaintiff in error merely as security for the payment of the \$3,000.00 note described in the complaint, and the Fairbanks Beverage Company, Inc., note was never paid (Tr. 17). The \$3,000.00 note sued on in the complaint was never surrendered by the plaintiff in error to the makers (Tr. 50, 79 and 80).

The counter-claim for \$2,000.00 pleaded in the amended answer (Tr. 13 and 14), is based on a promissory note for \$2,000.00, dated February 5,

1918, due on or before July 1, 1918, payable to the defendant in error and signed by the plaintiff in error and one D. Petree, but that note was given the defendant in error to indemnify him against liability on a note of one Frank Allberg against defendant in error and David Petree (Tr. 19, 20, 42 and 71).

Defendant in error was never compelled to pay any portion of the Allberg note and never did pay any portion thereof. Allberg cancelled the obligation without payment before the commencement of this action and surrendered and returned the note to the defendant in error (Tr. 42 and 71).

The cause was submitted to the jury by the Trial Judge and a verdict was rendered for the defendant in the sum of \$1,500.00 principal, with interest on \$2,000.00 at the rate of one per cent per month from the 5th day of February, 1918, to the 25th day of June, 1918, together with interest at a rate of one per cent per month on \$1,500.00 from the 25th day of June, 1918, to the date of judgment, and for the sum of \$250.00 attorney's fees (Tr. 156), and judgment was entered on the verdict for the amount of the verdict and costs.

SPECIFICATIONS OF ERROR.

The court erred in refusing to give to the jury the following instructions requested by the plaintiffs:

I.

To direct the jury engaged in the trial of the above entitled cause to bring in a verdict in favor of the plaintiffs upon plaintiffs' second cause of action, set forth in their complaint, said motion being made after all the evidence had been introduced in said cause.

II.

"You are instructed that the defendant admits in his pleadings the making, execution and delivery of the promissory note described in plaintiffs' second cause of action, and unless you are satisfied that the defendant has proved by a preponderance of evidence that David H. Cascaden, together with Dave Petree, is indebted to defendant on the promissory note described in defendant's answer, your verdict must be for the plaintiffs on their second cause of action set forth in their complaint."

III.

"You are instructed that in the first instance the plaintiffs were obliged to prove the allegations of their complaint by preponderance of evidence, and when that was done, then the burden shifted to the defendant to disprove plaintiffs' case and to prove the affirmative

matter set forth in his answer by a preponderance of evidence, and that so far as the counterclaim set forth in defendant's answer is concerned, he becomes the plaintiff and the burden of proof shifts to him and he must prove the allegation of said answer as regards the counterclaim by a preponderance of evidence."

IV.

"You are instructed that the plaintiffs in this action claim that the note for \$2,000.00 given by David Petree and David H. Cascaden to George Weber was to protect the defendant from loss if he was compelled to pay to one Allberg the sum of \$3,000.00 alleged to have been due to said Allberg, and if you are satisfied from the evidence that that was the purpose for which said note was given, then you are instructed that if said Weber did not pay said Allberg the sum of \$3,000.00, then said note was without consideration and neither of the makers thereof would be liable to said Weber for any part thereof. And if you are satisfied that said note was given for the purpose set forth, then the burden is on the defendant to show that said payment was made to said Allberg or someone for his use and benefit, prior to the time of the filing of defendant's amended answer in this cause."

V.

"You are instructed that there must be a good and valuable consideration for every contract or said contract cannot be enforced, and you are further instructed that if the consideration for the contract is the performance by the person for whose benefit said contract is made of some act in the future, and he fails to per-

form said act or acts, then the consideration for said contract is said to have failed, and said contract cannot be enforced."

The court erred in giving to the jury the following instructions:

VI.

"You are instructed that the defendant George Weber, as a counterclaim, claims that plaintiff David H. Cascaden is indebted to him in the sum of \$2,000.00, together with interest thereon, on a promissory note signed by David H. Cascaden, plaintiff in this case, and David Petree, dated February 5, 1918, less the sum of \$500.00, with interest, on a promissory note given to David H. Cascaden by defendant George Weber on the 25th day of June, 1918, which last mentioned note for \$500.00 is set up as the second cause of action in plaintiffs' complaint. And you are instructed that there being no competent evidence introduced by the plaintiff in opposition to said claim, the court now instructs you that you should find for the defendant George Weber with reference to said counterclaim; that is to say, for the sum of \$1,500.00 principal, with interest on the sum of \$2,000.00 at the rate of one per cent per month from the 5th day of February, 1918, to the 25th day of June, 1918, together with interest at the rate of one per cent per month on the sum of \$1,500.00 from the 25th day of June, 1918, to this date; and also for such further sum as you deem reasonable for attorney's fees."

VII.

"You are instructed that by reason of the

foregoing instruction there is left for your consideration to be determined by you whether or not the plaintiff could prevail as to the first cause of action set forth in the complaint, in which the plaintiff alleges that the defendant George Weber is indebted to plaintiff in the sum of \$3,000.00 and interest on a certain promissory note dated the 31st day of October, 1917, which is set forth in paragraph 4 of plaintiff's complaint, and which it is alleged that the plaintiff David H. Cascaden paid on the 25th day of June, 1918, in full, together with \$30.00 interest thereon, and which it is alleged that the defendant Weber has not repaid to the plaintiff, and that the whole of said sum of \$3,030.00 with interest at the rate of one per cent per month from the 25th day of June, 1918, is now due and unpaid; and also for the sum of \$600.00 attorney's fee in instituting and conducting this litigation with reference to this first cause of action; and also for the sum of \$150.00 for instituting and maintaining the litigation with reference to plaintiff's second cause of action on the note for \$500.00, with interest, the principal of which said note and interest is admitted by the defendant to be due to the plaintiff."

VIII.

"You are further instructed that if one of the signers of a note is compelled to pay the whole note, any or all the other signers of the note are liable for the repayment to the party who paid the note of the amount that was paid on the note over and above what was for the personal use or benefit of the person who paid the note; and if you are satisfied by a fair preponderance of evidence that no part of the

money represented by the \$3,000.00 note given to the Farmers' Bank of Fairbanks was for the use and benefit of David H. Cascaden, then you are instructed that the defendant would be liable to David H. Cascaden and to his guardian for the entire amount that said David H. Cascaden was compelled to pay to the Farmers' Bank of Fairbanks, unless you find that said indebtedness of Weber and Petree was transferred to the Fairbanks Beverage Company by and with the consent of said David H. Cascaden."

IX.

"You are instructed that if David H. Cascaden paid the note set forth in plaintiff's first cause of action to the Farmers' Bank of Fairbanks and took a note for \$3,033.00 and a mortgage from the Fairbanks Beverage Company, this act on the part of Cascaden constituted a payment of the promissory note set forth in plaintiff's first cause of action; and the question as to whether or not the mortgage so taken was a first or second mortgage is immaterial, and also as to whether or not said note of \$3,033.00 was or was not paid by the Fairbanks Beverage Company is immaterial, because the debt was changed by the aforesaid transaction from David Petree and defendant to the Fairbanks Beverage Company by express agreement with plaintiff Cascaden; and in that event the defendant Weber was released entirely from any obligations on account of said note set forth in plaintiff's first cause of action, and the said Cascaden can look only to the Fairbanks Beverage Company for payment of the said note for \$3,033.00, and the defendant Weber would not be responsible for the payment of the same, or

any part thereof, and your verdict should be for the defendant on plaintiff's first cause of action."

X.

"You are instructed that there is no evidence in this case whatever that would tend to prove that the note for \$3,033.00, executed by the Fairbanks Beverage Company in favor of plaintiff David H. Cascaden, was given as additional security for the payment of said promissory note marked Plaintiff's Exhibit 'A'; and there is nothing contained in the complaint of plaintiffs by which competent evidence could be introduced to show that said note for \$3,033.00, executed by the Fairbanks Beverage Company to the plaintiff David H. Cascaden, was given as additional security for the payment of said note of \$3,000.00, marked Plaintiff's Exhibit 'A'; and the jury are therefore instructed that they would not be warranted in considering said note of \$3,033.00 as additional security for the payment of said promissory note marked Plaintiff's Exhibit 'A'."

ARGUMENT.

In this brief the parties hereto will be designated as the plaintiff and defendant as they were in the Trial Court, that is, plaintiff in error we will designate as plaintiff, and defendant in error as defendant.

The first Specification of Error is based on the refusal of the court to grant plaintiff's motion to dismiss the affirmative defense and counterclaim of

the defendant's amended answer, and for a directed verdict thereon. We insist that the motion should have been granted on the ground and for the reason that it conclusively appears from all evidence in the record that there was no consideration whatever for the execution of the note, so far as David H. Cascaden is concerned; that all the evidence shows that at the time of the execution of the note Cascaden was not indebted to the defendant in any sum whatever, and that the signing of the note by Cascaden was not made a condition of the acceptance of the note by the defendant; that defendant did not request Cascaden to sign the note, and did not know that the note was signed by Cascaden until after it had been delivered to the defendant. It further appears that there was no obligation whatsoever on the part of Cascaden to sign the note, and that he was a voluntary maker of said note without consideration and without solicitation on the part of the defendant or any one else (Tr. 38, 39 and 48).

We will consider and discuss the second, third and fourth Specifications of Error together. They set out plaintiffs' first, second and sixth requested Instructions (Tr. 151 and 152). Such requests to charge the jury are predicated on plaintiffs' de-

fense to the note pleaded in the counterclaim of defendant's answer, and are based on plaintiffs' contention that there was an issue of fact raised by the pleadings and proof which should have been submitted to the jury. We contend the instructions tendered state the law correctly, and were not substantially covered or included in the instructions given the jury by the court. While it is true that a promissory note is *prima facie* evidence of indebtedness and of consideration, yet when want or lack of consideration is pleaded and proof is offered and received to sustain such pleading, then it devolves upon the parties alleging the indebtedness evidenced by such note to satisfy the jury by a preponderance of evidence that such note was given for a valid consideration.

8 C. J., 996.

“The rule is well settled in this commonwealth that in an action on a promissory note the burden of proof is upon the plaintiff to establish the fact that it is given for a valuable consideration. While the production of the note, with the admission or proof of the signature, makes a *prima facie* case, yet if the defendant puts in evidence of a want of consideration, the burden of proof does not shift, but remains upon the plaintiff, who must satisfy the jury by a fair preponderance of the evidence that the note was for a valid consideration.”

Huntington vs. Shute, 62 N. E., 380.

Tinker vs. Midland Valley Mercantile Co.,
231 U. S., 681;

34 *Supreme Court Reporter*, 252;

Render vs. Arkansas Valley Trust Co., 196
Federal 1.

“Where in an action on a note defendant denied that there was a consideration for the note, the burden of proof was on plaintiffs.”

Seager vs. Drayton, 105 N. E., 461.

“Where in an action on negotiable notes between the original parties, the defendant introduces evidence of want of consideration, the burden of proving consideration rests on the plaintiff.”

Cawthorne vs. Clark, 138 N. W., 1075.

Bogie vs. Nolan, 96 Mo., 85; 9 S. W. 14.

Search vs. Miller, 1 N. W., 975.

“By the Negotiable Instruments Law the burden of showing want of consideration rests upon the defendant sued on a note, and if he offers any evidence on the head, the plaintiff must show consideration by a fair preponderance of the evidence.”

Bank of Gresham vs. Walch, 76 Ore., 272; 147
Pac., 534.

Hudson vs. Moon, 42 Utah, 377; 130 Pac., 774.

Plaintiff in her amended reply pleads want and lack of consideration for the execution and delivery of the promissory note for \$2,000.00 pleaded in the counterclaim of the defendant's answer, and she

alleges that said note was given to indemnify defendant against any liability on a certain promissory note which defendant and one David Petree executed in favor of one Frank Allberg; that defendant was never compelled to and never did pay any part of such note (Tr. 19). The plaintiff testified (Tr. 69, 70 and 71):

“Q. What, if anything, did you ask Mr. Weber at that time in regard to any indebtedness that he claimed to be due from Dave Cascaden?

A. What was the first part of that?

Q. What question did you ask of him?

A. Oh, I asked Mr. Weber how it came that Dave owed him money, and he says, “Well, Dave didn’t owe me”—he says, “He don’t owe me anything.” “Well,” I says, “you are suing him for some money.” “Well,” he said, “that is”—“well,” he says, “Dave don’t owe me anything,” he says “That is something to do with Petree,” he says. “We promised to pay”—I think he said Alberg, they owed him something like three thousand dollars and something, and he said, “We agreed to pay that.” He says, “The firm has nothing to show for that, but,” he said, “we don’t—Dave doesn’t owe me anything, but,” he says, “I have agreed to pay that, and” he says, “it is Petree’s note.” That’s about the words he said. I think I wrote it down, Mr. Clark, and gave it to you right after.

Q. How long after you had this conversation did you write it down?

A. About five minutes from the time he

left. I went in the house and wrote it down so I wouldn't forget it.

Q. Had you, at my request, seen him to endeavor to find out what the basis of his claim was?

A. No, sir. Not at your request, Mr. Clark, exactly.

Q. Well, I had discussed with you before that how it came about Dave was on any note to Weber?

A. Yes, you asked me that.

Q. Was it after that you had this talk with him?

A. Yes, sir.

Q. And then you made a memorandum of this conversation?

A. Yes, and I brought it right up to your office.

Q. I will ask you to look at that memorandum, and ask you if that is the memorandum that you made a few minutes after your talk with Mr. Weber?

A. Yes, sir.

Q. What does that say?

A. Well, I have "Three thousand, Weber and Petree; three thousand paid afterwards Dave Cascaden; three thousand still due Ahlberg. Two thousand was to secure George in 1918, February 6th, when he left for outside, against balance of three thousand note due Ahlberg. Firm was to pay Ahlberg three thousand, but has nothing to show."

Q. Directing your attention to this part

of the memorandum that says 'two thousand was to secure George in 1918, February 6th, when left for the outside against balance of three thousand dollar note due Ahlberg.' Did Mr. Weber make that statement to you at that time?

A. He did, Mr. Clark.

Q. And you were referring to that two thousand dollar note that he has set up in his answer in this case?

A. Yes, sir; that is the note."

The defendant testified (Tr. 42, 44 and 45):

"Q. How much did you pay for the bottling works?

A. Nine thousand dollars. That was the price.

Q. How much was paid in cash?

A. Three thousand.

Q. Who paid it?

A. Mr. Petree and myself.

Q. How much did you put up?

A. I put up my share.

Q. How much was that?

A. Fifteen hundred.

Q. You are sure that you put up the fifteen hundred at that time?

A. Yes.

Q. That only accounted for three thousand. Now where was the rest of it, where did the rest of it come from?

A. Three thousand dollars borrowed from the Farmers Bank and three thousand we still owed.

Q. Where is that note that you gave to Ahlberg for the remaining three thousand dollars?

A. That is in the possession of Mr. Roth, I believe.

Q. That has never been paid, has it?

A. No.

Q. That is signed by you and Petree?

A. Yes.

Q. Then that three thousand dollars that was borrowed from the Farmers Bank was the second three thousand that was paid on account?

A. Yes." (Tr. 42).

"Q. About how much was paid altogether?

A. I couldn't recollect anything about it, Mr. Clark.

Q. How did it figure out that Petree owed you just two thousand dollars?

A. That is what we figured up that time.

Q. Isn't it a fact, Mr. Weber, that note was given to you to protect you in the event that you had to pay to Ahlberg the balance of that three thousand dollars?

A. Not as I recollect it.

Q. Now isn't it possible that is what it was given for?

A. I don't think so.

Q. Didn't you tell Mrs. Cascaden that that is what it was given for?

A. No, not as I recollect.

Q. Mr. Weber, you remember last spring, that is, in the spring and early summer of 1922, there was some litigation between yourself and the Cascaden estate?

A. Yes, sir.

Q. And you finally settled the litigation, it was finally settled? You remember that, don't you?

A. It was settled by foreclosure, yes.

Q. No, you remember the suit that you brought, Mrs. Cascaden settled it and gave you some syrups and other stuff that was up there?

A. That was William Bittner.

Q. It represented a part of your account, didn't it?

A. Of some wages we put in, yes.

Q. You remember when that case was settled, don't you?

A. Yes.

Q. Do you remember a day or two after that was settled about having a talk with Mrs. Cascaden at the gate where she was living up at the Heilig house?

A. Oh, yes, that is correct.

Q. Do you remember her at that time asking you how it happened that Dave Cascaden owed you any money? Do you remember her asking you that?

A. About this note, yes, that's correct.

Q. Did you not say to her at that time that 'Dave Cascaden doesn't owe me anything'?

A. Well, originally it was Mr. Petree's note, yes.

Q. Well, didn't you tell her that Dave Cascaden didn't owe you anything, that Petree is the man who owed you the money?

A. Originally, yes.

Q. And didn't you tell her at that time that when you were getting ready to go outside you were afraid that you might have to pay the Ahlberg note and that that note was given, this note for two thousand dollars was given you to protect you against having to pay all of that three thousand dollar note?

A. Not the same words to the same effect, no, Mr. Clark.' (Tr. 44 and 45).

"When such a prima facie case is established the burden of evidence is then shifted upon the party who does not have the affirmative of the issue, the position of the burden of proof being in no way affected. Since affirmative action of the tribunal demands that the party who has the burden of proof shall at the end of the trial stand in possession of a prima facie case in his favor, the party who has not the affirmative of the issue succeeds for the time being, if he can impair the prima facie quality of the case against him, and the burden of evidence thereupon returns to the party having the burden of proof; and this process continues until the stock of relevant facts is exhausted." (16 Cyc. 934).

The pleadings and proof in this case show that

David Cascaden had been, prior to the commencement of this action, adjudicated an insane person and during all of the time between the commencement of the trial until after judgment was entered he was confined in a hospital for the insane; that after the entry of judgment and prior to the date of the prosecution of this Writ of Error he died, and his wife, Blanche Cascaden, was appointed administratrix of his estate and in such capacity was substituted as plaintiff in error, (Tr. 182, 183, 184). Under such circumstances, the testimony of the defendant, who was the only person called at the trial who could have been cognizant of all of the facts and circumstances surrounding the various transactions bearing on the present controversy between the estate of the deceased Cascaden and the defendant, should be carefully and critically scrutinized. It will be observed that his testimony concerning the \$2,000.00 note pleaded in his counterclaim was very unsatisfactory. He testified (Tr. 44), in response to the following questions:

“Q. Isn't it a fact, Mr. Weber, that note was given to you to protect you in the event that you had to pay to Ahlberg the balance of that three thousand dollars?

A. Not as I recollect it.

Q. Now isn't it possible that is what it was given for?

A. I don't think so.

Q. Didn't you tell Mrs. Cascaden that that is what it was given for?

A. No, not as I recollect."
And again (Tr. 45), he testified as follows:

"Q. Do you remember her at that time asking you how it happened that Dave Cascaden owed you any money? Do you remember her asking you that?

A. About this note, yes, that's correct.

Q. Did you not say to her at that time that 'Dave Cascaden doesn't owe me anything'?

A. Well, originally it was Mr. Petree's note, yes.

Q. Well, didn't you tell her that Dave Cascaden didn't owe you anything, that Petree is the man who owed you the money?

A. Originally, yes.

Q. And didn't you tell her at that time that when you were getting ready to go outside you were afraid that you might have to pay the Ahlberg note and that that note was given, this note for two thousand dollars was given to you to protect you against having to pay all of that three thousand dollar note?

A. Not the same words to the same effect, no, Mr. Clark."

If the defendant considered the two thousand dollar note a valid claim against Cascaden, why did he not insist on applying the \$500.00 which he received from Cascaden on the 25th day of June,

1918, toward the payment of that note, instead of giving his own note for the latter amount to Cascaden?

The defendant testified (Tr. 38), regarding that matter as follows:

“Q. And how did you come to give him a note for it?

A. Well, he wouldn't accept it on this note here, on the other one I had from Mr. Petree, because he didn't owe it to me.”

Defendant admits that at the time of the execution of the two thousand dollar note he and Petree were indebted to Ahlberg on a note and that that note was never paid, but was surrendered to him and was in the possession of his attorney during the trial (Tr. 42 and 82).

Was the two thousand dollar note pleaded as a counterclaim given to indemnify defendant against liability on the Ahlberg note? Obviously that question should have been answered by the jury under proper instructions, and we contend the instructions requested by the plaintiff correctly state the law and should have been given by the Court.

The 5th Specification of Error is the Court's refusal to give the jury plaintiffs' requested instruction No. 7 (Tr. 152 and 153). We submit,

while the charge requested states an abstract proposition of law, yet it should have been given to the jury because it states the law correctly and is not covered by the instructions given.

The 6th and 7th Specifications of Error are based on plaintiff's exceptions to the 8th and 9th Instructions given by the Court to the jury (Tr. 143 and 144). All of the reasons assigned why the requested instructions set forth in Specifications 2, 3 and 4 should have been given, can be assigned with equal force against the giving of Instructions 8 and 9 set out in Specifications 6 and 7. The Court, in giving Instruction No. 8, obviously invaded the province of the jury, for not only was there evidence of the want and lack of consideration for the two thousand dollar note pleaded as a counter-claim, but we contend that the decided weight of the evidence preponderated in favor of the plaintiff on that proposition.

The jury are the exclusive judges of all questions of fact. Section 1023 of the Compiled Laws of the Territory of Alaska provides:

“In charging the jury the Court shall state to them all matters of law which it thinks necessary for their information in giving their verdict, but it shall not present the facts of the case, but shall inform the jury that they are the exclusive judges of all questions of fact.”

Where there is evidence of a fact in issue, even though strongly contradicted, an instruction is erroneous which ignores that fact.

Anderson vs. N. P. Lumber Co., 28 Pac. 5;

Flore vs. Ladd, 36 Pac. 572;

Crossley vs. Reynolds, 196 Federal 640;

Dome City Bank vs. Barnett, 184 Federal 607; 38 Cyc. 1626 to 1633;

King vs. King, 83 Wash. 615;

Brown vs. Pullen, 259 Federal 858; 14 R. C. L. 728;

Willey vs. Crane, 36 N. W. 734.

The 13th Instruction given the jury (Tr. 146 and 147), recited in the 8th Specification of Error, is faulty because it contains the following language:

“Unless you find that said indebtedness of Weber and Petree was transferred to the Fairbanks Beverage Company by and with the consent of said David H. Cascaden”

because there is no evidence that Cascaden ever consented to the transfer of the indebtedness to him of the defendant and Petree to the Fairbanks Beverage Company. In fact, the evidence contradicts any such inference, because the Farmers' Bank note was delivered to Cascaden when he paid the same, and he did not surrender that note to the defendant or Petree when the Beverage Company

note was given to him, nor did he ever deliver that note to either Petree or the defendant (Tr. 50).

The note referred to was found by Mrs. Cascaden in the safety deposit box of her deceased husband after she was appointed guardian of his person (Tr. 79 and 80).

The 9th and 10th Specifications of Error are based on the giving of Instructions 15 and 16 (Tr. 147 and 148). Instruction No. 15 is an incorrect and a highly prejudicial statement of both law and fact. It is in direct conflict with Instructions 9 and 10, for in both of those instructions the Court assumes that the question as to whether or not the \$3,033.00 note described in the further second and affirmative defense of defendant's answer (Tr. 12) was accepted by Cascaden as absolute payment of the note set out in the first cause of action of plaintiff's complaint was one for the jury, and such instructions direct the jury to determine that question according to the weight of the evidence.

Instruction No. 15 is also in conflict with Instruction No. 14, because in Instruction No. 14 the Court instructed the jury that the defendant admitted that Cascaden paid to the bank the principal and interest of the note on which plaintiff's first

cause of action is based, but in Instruction No. 15 the Court instructed the jury to find whether such payment had been made by Cascaden. Instruction No. 14 states the facts correctly, since it is admitted in the answer (Tr. 11), that Cascaden paid that note and interest to the bank. Instruction No. 15 does not correctly state the law since the Court assumes that the giving of a promissory note is absolute payment of an obligation, regardless of whether there is an agreement between the parties that the receiver of such note accepts the same as absolute payment of the original obligation, because the Court says that the taking of the note and mortgage for \$3,033.00 from the Fairbanks Beverage Company constituted a payment of the promissory note set forth in plaintiff's first cause of action.

The giving of a note does not constitute payment of indebtedness unless there is a specific agreement to that effect. In the absence of such an agreement the note will be construed only as conditional payment. Instruction No. 15 is prejudicially faulty for another reason, because in it the Court instructed the jury that the question as to whether the Beverage Company note was paid is immaterial. We contend that that was a very material question, because there is no evidence that the

Beverage Company note was taken by Cascaden as absolute payment of the note set forth in plaintiff's first cause of action, which note was signed by Cascaden as surety and thereafter by him paid. In the absence of such an agreement it devolves upon the defendant to show that the Beverage Company note given to Cascaden was actually paid. The record in this case shows that the Beverage Company note was not paid (Tr. 123, 124, 125 and 126) shows the Marshal's Return on Special Execution. The plaintiff in this action brought an action against the Beverage Company to foreclose two certain mortgages (Tr. 87 to 127 inclusive). The two mortgages given to secure three notes were foreclosed and the Marshal's Return shows that only sufficient funds were realized from the sale of all the property mortgaged to pay the first two notes; no sum whatever was paid on the second mortgage, and the second mortgage was given to secure the note which the defendant contends the plaintiff accepted as payment of the note described in his first cause of action. The defendant (Tr. 54 and 55) virtually admits that the Beverage Company note given to the plaintiff, which note is in controversy herein, was never paid. The fact that the Beverage Company note was secured by a mortgage is immaterial.

“It is insisted that, although the acceptance of the note merely might not be payment, yet, treating the note as payment, as was done here, by crediting it as payment on appellee’s books, and in statements of account rendered, shows that the note was taken in payment. We do not consider this any stronger evidence, in that regard, than were the receipts in full which were given in the cases cited from Johnson. In regard to the receipt in *Johnson vs. Weed*, the court remarked: ‘It might still have been understood, consistently with the words of it [receipt], that the note was received in full, under the usual condition of its being a good note.’ And so in *Brigham vs. Lally*, 130 Mass. 485, a case where such a note of a third person had been taken on an open account, and the debtor credited therewith, it was held that the trial court properly refused to rule that placing the note to the credit of the defendant upon the plaintiff’s journal and ledger, and making no other appropriation of the money, was in law a payment. We think the ruling of the court here complained of is entirely well sustained by authority.” *Cheltenham Stone & Gravel Co. vs. Gates Iron Co.*, 16 N. E. 923, at 924.

In *O’Byran vs. Jones*, 38 Mo. Appeals, 90, the Court approved the following instruction given by the Trial Court:

“The Court declares the law to be that the delivery of the note of J. W. Carlyle by defendants to plaintiff and the acceptance by plaintiff of said note is to be treated prima facie as a conditional payment only; that it is a payment only if paid by maturity by the maker thereof, and before the Court can find that

the delivery and acceptance of said note was a payment absolute from defendants to plaintiffs it must believe from the evidence that said delivery and acceptance was under an express agreement that the plaintiff should take the note absolutely as payment, and at his own risk of collection; and in the absence of such express agreement the delivery and acceptance of the note would be no payment, if it afterwards appears to be of no value *and the proof that there was such an express agreement rests upon the defendants.*"

"Whether the taking of a note for the amount of a pre-existing note is payment of the first note is rather a question of fact than of law; and when a note is given signed by any other than the maker of the previous note and the previous note is retained by the payee as in this case, it is very clear that the law does not raise a presumption that such note is payment, and although no agreement in relation to it is specifically proved, the question whether or not it was given and received in payment is one of those facts which the jury must decide." *Woods vs. Woods*, 127 Mass. 141, the above quotation being made from page 149. *Mutual Benefit Life Insurance Co. vs. First National Bank*, 169 S. W. 1028. *National Bank vs. Jose*, 10 Wash. 185.

"Where in such transaction the note and mortgage evidencing the prior indebtedness are retained by the creditor and a new note and mortgage taken for the amount due on the same indebtedness, the taking of such new note and mortgage will not effectuate payment of the prior indebtedness unless there is an express agreement of the parties that such note and mortgage were received in payment and

satisfaction of such prior indebtedness." *Chamberlain Banking House vs. Woolsey*, 83 N. W. 729. *Ryan vs. Security Savings & Commercial Bank*, 271 Federal, 366.

"The acceptance by a creditor of the promissory note of his debtor for his antecedent debt does not extinguish it unless the note is paid. It is not an absolute, but a conditional payment of the debt." * * * *

"A clear agreement by the creditor that he will take the risk of the payment of the note, and that the debt is discharged thereby, or the indubitable intention of both the parties to that effect, is requisite to extinguish a debt by the taking of the debtor's note. An agreement that a debt shall be paid, or shall be payable, or that it has been paid by the note of the debtor, is a contract for an extension of the time of payment and that the debt shall be paid or that it has been paid by the note of the debtor on condition that the note is paid, but not otherwise." *A. Leschen & Sons Rope Co. vs. Mayflower G. M. & R. Co.*, 173 Federal, 855, at 857 and 858.

The opinion last quoted from was written by Judge Sanborn of the 8th Circuit and the writer of the opinion cites numerous authorities to sustain the doctrine announced. This Court said, in *Stewart vs. Laberee*, 185 Federal, 471 at 473:

"The writ of error presents the question of law whether upon the facts proven under the issues, it is shown that the indebtedness of the plaintiff in error to the construction company had been paid or satisfied. There is no evidence of an agreement between the parties that the

notes were received as payment of the debt. In the absence of such an agreement the common law rule prevails in nearly all the states and is adopted in the Federal Courts, that the original demand is not paid or extinguished by the note."

It may be contended that there is evidence that the Beverage Company note was accepted as payment, because the defendant testified (Tr. 31), in response to a leading question by the Court, that the Beverage Company note was in payment of the Farmers' Bank note, but that is a mere conclusion of the witness, because he says that the note was paid when the mortgage was foreclosed, but the record of the foreclosure proceedings hereinbefore quoted shows that the note was not paid. Furthermore, the defendant did not state that the Beverage Company note was accepted as absolute payment of the Farmers' Bank note. He seemed to proceed upon the same theory as the Court, that the mere receipt by Cascaden of the Beverage Company note was payment of the other note. It may be contended that the minutes of the board of directors of the Beverage Company, being defendant's Exhibit 7 (Tr. 128, 129 and 130), indicates a transfer from defendant to the Beverage Company of defendant's obligation to plaintiff, but the only reasonable inference deducible from the minutes

of that meeting is that the Beverage Company note was to be taken by Cascaden merely as security for the payment of the other note, for the minutes state (Tr. 129 and 130):

“And in order to obtain said loan and execute said security that the officers of this company be further authorized and directed to make, execute and deliver to the said Cascaden its promissory note for the amount of three thousand (\$3,000.00) dollars and accumulated interest on said Farmers’ Bank debt, secured by a second mortgage upon the assets of this company for the purpose of paying and liquidating the note and mortgage of three thousand (\$3,000.00) dollars and interest due to the Farmers’ Bank of Fairbanks, Alaska.”

It cannot be inferred from the above quotation that it was intended by Cascaden and the other officers of the Beverage Company that Cascaden was to receive the Beverage Company note as absolute payment of the Farmers’ Bank note. On the contrary, it appears that the officers of the Beverage Company, in order to procure the loan which the resolution shows it had procured from Cascaden, that that company was willing and desired to give him additional security for the payment of the note which he had paid the Farmers’ Bank. We submit, therefore, that there is no evidence in the record to warrant an inference that Cascaden ever agreed or intended to receive the Beverage Com-

pany note as absolute payment of the Farmers' Bank note. The fact that Cascaden retained the bank note in his possession after the giving of the Beverage Company note, and the further fact that neither Petree nor the defendant, the principal makers of said note, ever demanded the same from Cascaden, is strong evidence that none of the parties intended that the Beverage Company note was to be taken by Cascaden as absolute payment of the Farmers' Bank note. Defendant's Exhibit 7 (Tr. 128, 129 and 130) strongly corroborates the contention that the Beverage Company note was given to and received by Cascaden as security for the payment of the Farmers' Bank note.

In Instruction No. 16 (Tr. 148 and 149), which is set forth in the 10th Specification of Error, the Court instructed the jury that there was no evidence that the Beverage Company note was given as security for the Farmers' Bank note, and as hereinbefore contended, we submit that all of the evidence in the record, including the retention of the Farmers' Bank note by the plaintiff after he had received the Beverage Company note, and the failure on the part of principal makers of the bank note to demand that note from the plaintiff after he had received the Beverage Company note, is persuasive

evidence of the fact that the Beverage Company note was received as security. The resolution of the board of directors of the Beverage Company shows that both Cascaden and that company intended that its note should be received by Cascaden as additional security for the payment of the bank note, because if it considered or believed that Cascaden was to receive its note as absolute payment of the bank note, then it would have further provided in that resolution for a surrender by Cascaden to that company of the bank note upon the execution and delivery of its note and mortgage securing the same to Cascaden.

We respectfully submit that the judgment of the Trial Court should be reversed and set aside for the reasons herein assigned.

JOHN A. CLARK,
Fairbanks, Alaska,

LYONS & ORTON,
920 Alaska Bldg.,
Seattle, Washington,

Attorneys for Plaintiff in Error.

No. 4093

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BLANCHE CASCADEN, as administratrix of the
estate of DAVID H. CASCADEN, deceased,
(substituted plaintiff for DAVID H. CAS-
CADEN and BLANCHE CASCADEN, as guardian
of the estate of DAVID H. CASCADEN, an
insane person),

Plaintiff in Error.

vs.

GEORGE WEBER,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

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R. F. ROTH,

Attorney for Defendant in Error.

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FILED

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VS.

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BRIEF FOR DEFENDANT IN ERROR

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Territory of Alaska, Fourth Division.

Errors in Plaintiff's Statement.

On page 4 of plaintiff's brief occurs this state-
ment: "But the latter note was given plaintiff in
error merely as security for the payment of the
\$3000 note". This is plaintiff's contention but the
contention is not supported by any evidence.

And on page 5 of plaintiff's brief occurs this
statement:

“But that note was given the defendant in error to indemnify him against liability on a note of one Frank Allberg against defendant in error and one David Petree.”

The evidence shows that the \$2000 note was given for money owed by Petree to Weber and that Cascaden was a comaker. There is no evidence that the note was *not* to be paid *unless or until* Weber paid the Allberg note.

Points, Argument and Authorities.

(1)

THE FIRST CAUSE OF ACTION.

Neither party made a case on this cause of action in strict accord with his pleadings. The variances however do not confuse the essential question involved. That question was “Is there any liability from Weber to Cascaden for or on account of anything done by Cascaden re the \$3000 note”?

We maintain that Weber is not and never was liable to Cascaden. There is evidence—written evidence, signed by Cascaden himself—evidence absolutely undisputed and undisputable—which impelled a verdict for defendant in error on the first cause of action; and, that being so, errors in instructions, if any such errors there were, were harmless. The evidence we refer to is contained in the Minutes of the Fairbanks Beverage Company of date June 25, 1918. (Tr. p. 128.)

It will be recalled that the note mentioned in the complaint (\$3000 note) was given October 31, 1917, by Petree and Weber to the Farmers' Bank for the purpose of obtaining from said bank the second \$3000 of cash needed to effectuate the purchase by Petree and Weber of the Tanana Bottling Works then owned by one Allberg. (Tr. pp. 26, 42.) Petree and Weber became the Tanana Bottling Works. Cascaden had no interest therein. The note was signed by Petree and Weber only and the due date was April 30, 1918, and the note was secured by certain property which later passed to the Fairbanks Beverage Company.

The Fairbanks Beverage Company was organized on April 27, 1918. (Tr. p. 36.) Petree was president and Cascaden was vice-president (Tr. p. 67), and Weber was secretary and treasurer. These three were the sole directors and the only stockholders of the Beverage Company. (Tr. p. 34.)

When the said note of Petree and Weber to the Farmers' Bank became due (to-wit on April 30, 1918) they were unable to meet it and, Cascaden then signing it, it was extended for 60 days (or until June 30, 1918. (Tr. p. 28.) As the last mentioned date approached means had to be devised by the Beverage Company that the note be met, because it was secured by a mortgage on a portion of the Beverage Company's property; and, as the Beverage Company was also in need of working capital, a special meeting of its directors was held

on June 25, 1918. The minutes of that meeting (signed by all the directors—Cascaden included) speak for themselves. Those minutes read as follows (*italics ours*):

“Minutes of Special Meeting of the Board of Directors of the Fairbanks Beverage Company, Inc., June 25, 1918.

At a special meeting held at the office of the Fairbanks Beverage Co., Inc., on June 25th, 1918, there being present *all* of the directors of said company, *to-wit: David Petree, David H. Cascaden and George Weber*; the holding of said meeting unanimously agreed to and notice thereof, as well as notice of the objects of said meeting having been expressly waived, the following proceedings were had, to wit:

After a discussion of the finances of the company and it appearing that a note for three thousand (\$3,000.00) dollars and interest due to the Farmers' Bank of Fairbanks, Alaska, secured by a mortgage on a portion of the property of the Fairbanks Beverage Co., Inc., has been due since April 30th, 1918, and that, in addition thereto said company needs ready money to the extent of about five thousand (\$5,000.00) dollars, for the purpose of extending and carrying on its business and liquidating its bills payable, David H. Cascaden expressed his willingness to loan this company said necessary money aggregating about eight thousand twenty-five (\$8,025.00) dollars, at the banking rate of 12% interest per annum, for a reasonable time, upon condition that the said company execute to said Cascaden its promissory notes secured by mortgage upon the assets of said corporation.

Thereupon it was moved by David Petree, seconded by George Weber and *unanimously* carried, that said *offer* be accepted and that this

company, by its President and Treasurer, be authorized and directed to make, execute and deliver to the said Cascaden its promissory *note, or notes*, aggregating the sum of five thousand (\$5,000.00) dollars, bearing interest at 12% per annum for such time as may be agreed upon, secured by a first mortgage *upon all of the assets of said company*. And in order to obtain said loan and execute said security that the officers of this company be further authorized and directed to make, execute and deliver to the said Cascaden its promissory note for the amount of three thousand (\$3,000.00) dollars and accumulated interest *on said Farmers' Bank debt*, secured by a second mortgage upon the assets of this company *for the purpose of paying and liquidating the note and mortgage of three thousand (\$3,000.00) dollars and interest due to the Farmers' Bank of Fairbanks, Alaska*. And, further, that action be *forthwith* taken to carry out the objects of this resolution.

There being no other business to come before this meeting it was moved, seconded and carried that this Directors' meeting be adjourned.

(Seal) DAVID PETREE,
DAVID H. CASCADEN,
GEORGE WEBER."

(Defendant's Exhibit 7, Tr. pp. 128-9-30.)

From these minutes—signed by Cascaden himself and absolutely uncontradicted and unimpeached—four things are apparent, viz:

(I) That the \$3000 note was secured by a mortgage "on a portion" of the property of the Beverage Company.

(II) That on that account the Beverage Company was directly interested in the payment and liquidation of the \$3000 note and (with the consent of all parties except the bank which was not interested in who paid said note, so long as same was paid) elected to treat the note as its own indebtedness, at least to the extent of borrowing money wherewith to pay and liquidate it; and that it voted to pay and liquidate the note.

(III) That Cascaden offered (and the Beverage Company accepted the offer) to loan to the Beverage Company the money *needed* for the purpose of paying and liquidating the said note, and *to loan* that money *for that express purpose*—he taking a note of the Beverage Company and a mortgage *on all the assets of the Beverage Company* to secure the note which the Beverage Company agreed to give him for the loan he agreed to make to the Beverage Company.

(IV) That the officers of the Beverage Company are to execute these “minutes” *forthwith*.

Now after this agreement had been made, but on the same date, to wit: June 25, 1918 (five days before maturity), the said note of \$3000 to the Farmers’ Bank is paid by Cascaden, the vice-president of the Beverage Company—that is, Cascaden is the person who handed the money to the Farmers’ Bank.

The essence of the transaction is simply this: that instead of handing to the Beverage Company

the money wherewith to pay and liquidate the note to the Farmers' Bank (as he had agreed to do) and letting the company pay the note when due (which would have been the natural and logical way to execute the agreement), he himself ("in a huff" (Tr. pp. 29, 30)) hands the money to the bank (*before the note is due*) in payment and liquidation of the note, receives back the note from the bank, has the mortgage securing the note *released* (Tr. p. 56; Mack, Tr. p. 66; Exhibit 6, Tr. p. 128), demands the Beverage Company's note, as per agreement (Tr. p. 30), receives the said last mentioned note (and later reduces it to judgment). (Tr. pp. 87 to 120 incl.)

There is no evidence that he paid the \$3000 note in his capacity as accommodation maker. The evidence is all to the contrary, for on paying it he had the mortgage securing it marked *paid and released* and he said to the Beverage Company "You will make out a note to me and a mortgage". (Tr. p. 30.) If he had paid as accommodation maker he would not have had the \$3000 mortgage released; nor, if he had paid as accommodation maker, would he have had any "call" to demand a note and mortgage from the Beverage Company.

Cascaden had no right of action against Petree or Weber.

Cascaden's contract with the bank, in signing the \$3000 note, was, of course, that of a note maker with a payee; but his contract with Petree and

Weber, his comakers, was not on the note at all; and whatever inchoate right of action he may have had against Petree and Weber by reason of signing the note as a comaker for their accommodation that right of action would not be on the note but on the contract of indemnity which the law implies from the relation between the accommodating party and the accommodated party. The obligations of this relation are not worked out through the note.

8 C. J. Sec. 424 (2) p. 270.

Said contract of indemnity is that Petree and Weber will indemnify Cascaden if he should be compelled to pay the note *at or after maturity*; it is not that they will indemnify him if he voluntarily, or at the instance of some one else, pays the note before it is due.

8 C. J. Sec. 423, p. 270 (1) second subsection;
Shannan v. Langhorn, 9 L. A. Ann. 526;
Stark v. Alford, 49 Tex. 260.

As accommodation maker, then, Cascaden had no right to pay the note five days, or any length of time, before it was due, for that was not his contract with Petree and Weber.

In paying the note before it was due Cascaden's position, so far as Petree and Weber is concerned, was that of an entire stranger—his action was purely voluntary.

If a stranger, without being asked so to do by the makers of a note, voluntarily *pays* said note, he

has no recourse against the makers; different, of course, if the stranger *purchases* the note, but there is here no pretense that Cascaden *purchased* the note—on the contrary, the allegation and the evidence is that the note was *paid and discharged*.

Thus neither Petree nor Weber was ever liable to Cascaden for or on account of the payment of the Farmers' Bank note. Such liability could not have arisen until the note should have been due and it could not have arisen even then unless Cascaden should have paid it in his capacity as accommodation maker; but before the note became due it was paid and liquidated by the Beverage Company by and through Cascaden and the note was delivered to the company's vice-president (Cascaden) and the mortgage securing the note was marked paid and released of record.

In paying the note and securing release of the mortgage Cascaden acted not as an accommodation maker compelled to pay for his comakers; on the contrary he was paying for purposes of his own, viz. for the purpose of earning the Beverage Company's note and mortgage—he earned said note and mortgage before there was any call on him to do so under his agreement with the Beverage Company, but only the Beverage Company could complain of that and it was satisfied—he earned the Beverage Company's note and mortgage by doing as he agreed to do, i. e. by lending to the Beverage Company the money wherewith to pay and liquidate the

note,—only, instead of directly handing to the Beverage Company the amount of the agreed loan he handed it to the bank and thus did for the Beverage Company the very thing *it* was to do with the money which it was to get from him, as per agreement with him, and the Beverage Company ratified this “too previous” action by executing its note and mortgage as it had agreed to do, and Cascaden has reduced that note and mortgage to judgment.

Plaintiff would have it that Cascaden is entitled to double credit, to-wit, first as against Petree and Weber for paying the note, and, second as against the Beverage Company for the money loaned by him to it wherewith he paid the note for it.

Defendant's Citations Are Not Applicable.

On pages 29, 30, 31 of plaintiff's brief, cases are quoted from to the effect that notes for which renewal or security notes have been taken are not discharged unless the renewal notes or security notes have been paid or the original note surrendered. We do not question those cases, but they are not applicable here—because there is here no question of renewal note or security note; on the contrary the so-called original note has been *paid and liquidated; not renewed, not secured but paid and liquidated, by and for the Beverage Company through Cascaden, it's vice-president, who agreed to lend it the money for that express purpose and did so loan it.*

When the Farmers' Bank note was paid it was delivered by the bank to Cascaden because Cascaden was the man who handed the cash to the bank and the bank was not interested in who paid the note nor in what became of it. Cascaden retained possession of the note it is true, but it was his duty either to deliver it to Beverage Company or to destroy it. Neither Petree nor Weber could demand the paid note, because neither had paid it. If any one has a right of action against Petree or Weber it is the Beverage Company—not Cascaden.

II.

THE SECOND CAUSE OF ACTION.

This cause of action arises on an unpaid note for \$500 dated June 25, 1918, due December 25, 1918, made, executed and delivered by defendant to plaintiff. (Tr. p. 8.) No defense is pleaded, but defendant sets up an overbalancing counterclaim. (Tr. p. 13.)

III.

THE COUNTERCLAIM.

The counterclaim pleaded arises on a note dated February 5, 1918, for \$2000, due July 1, 1918, made, executed and delivered by plaintiff and David Petree to defendant.

The court instructed the jury that they must find for defendant on this note. Said instruction is assigned as error. We submit that said instruction was entirely proper under the evidence.

Plaintiff pleaded in reply (1) That there was no consideration for the note (Tr. p. 18, Par. IV); (2) That the consideration has failed. (Tr. p. 19.)

We do not controvert the cases cited by plaintiff to the effect that when, in an action on a note between payee and maker, a want of or failure of consideration is pleaded *and evidence is introduced* showing or tending to show such want of consideration or failure of consideration, the case is for the jury; but it is elementary that, in such action the well known presumption as to the existence of a good consideration prevails, if there be *no evidence* of a want or failure of consideration.

Now in this case there is *no evidence* of a want or failure of consideration.

(1) No evidence of want of consideration.

Weber (defendant) swore that this note was given to him by Petree for a bona fide indebtedness of Petree to him and that Petree induced Cascaden to join him as comaker; that the note is due and has not been paid. (Tr. pp. 35, 36, 37.) This evidence is entirely uncontradicted.

(2) No evidence of failure of consideration.

Plaintiff also pleaded that the consideration had failed, alleging:

“(1) That prior to the 5th day of February, 1918, David H. Cascaden, George Weber, and David Petree had purchased from one Frank Allberg certain property in the town of Fairbanks, Alaska, and the purchasers paid on account of the purchase price the sum of approximately \$6,000.00, and there remained due to said Allberg the sum of approximately \$3,000.00.

(2) That George Weber, defendant in said action, fearing that he might be compelled to pay the balance of the said purchase price of said property to said Allberg in the absence of David H. Cascaden and David Petree, and as a protection in the event that he should be compelled to make such payment, procured from said David H. Cascaden and David Petree the promissory note [17] described in paragraph three of defendant's answer, which said promissory note was to be paid by said David H. Cascaden and David Petree to said Weber, in the event that Weber was compelled to pay to said Allberg the \$3,000.00 balance of the purchase price on the property purchased from said Allberg and described above, but not otherwise. That said note was intended to reimburse said Weber in the event he paid the proportion of the balance of the purchase price that was properly payable by said Cascaden and said Petree.

(4) That said Weber never paid to said Allberg the balance of said purchase price of said property, and the consideration for said note failed, and said note is without consideration and is void, and plaintiff herein David H. Cascaden is not now, and never has been, liable for the payment of any part or portion thereof.” (Tr. p. 19.)

There is no evidence to sustain the allegation that *Cascaden*, Weber, and Petree purchased any property from Frank Allberg or that *Cascaden* owed Allberg any part of the \$3000 unpaid purchase money for the bottling works—on the contrary the undisputed evidence is that only Weber and Petree were Allberg's debtor and that *Cascaden* had nothing to do with the purchase from Allberg. (Tr. p. 27, bottom; p. 41, bottom; p. 53, top.) There is no evidence "that said note was intended to reimburse said Weber in the event he paid the portion of the balance of the purchase price that was properly payable by said *Cascaden* and said Petree".

Plaintiff relies on the evidence of Mrs. *Cascaden* that "last Spring" (Spring of 1922) Weber told her that

"Two thousand was to secure George in 1918, February 6th, when he left for outside, against balance of three thousand note due Ahlberg. Firm was to pay Ahlberg three thousand, but has nothing to show". (Tr. p. 71.)

Weber denies that he made any such statement (Tr. pp. 45-46) and, considering the fact that Petree did owe him \$2000 (Tr. pp. 35-6-7) and that *Cascaden* owed him nothing before he signed the note and owed nothing to Allberg and that Petree's legitimate share of the indebtedness to Allberg was \$1500 (not \$2000) such a statement would have been absurd in the extreme; and it is exceedingly unlikely that it was made.

But granting that the statement was made and granting that it was true, it affords no evidence showing or tending to show a failure of consideration. The alleged statement is this,

“Two thousand was to secure George in 1918, February 6th when he left for outside against a balance of three thousand note due Ahlberg.”
(Tr. p. 71; Plaintiff’s Brief, p. 23.)

Counsel argue as if the statement was to the effect that the \$2000 note was *not to be paid unless Weber “on his trip to the outside in February 1918”* should at that time be compelled to pay the entire sum called for by the Allberg note; but we submit that there is nothing in the statement as alleged to have been made which is at all susceptible of the construction counsel would put upon it. There is not one word in the alleged statement about the *payment* of the Allberg note—on the contrary the alleged statement is that the \$2000 note was to secure Weber against the Allberg note. The consideration then could not fail until the liability of Weber on the Allberg note is at an end. That liability was not at an end, for the undisputed evidence is that the Allberg note was, at the time of the commencement of the action and at the time of the trial, an outstanding obligation against Weber. Petree left the country owing Weber and has since died. (Tr. p. 64.) Petree’s liability on the Allberg note was \$1500 (one-half). That note has never been paid. (Tr. p. 42, 10th line from bottom.) Weber says (undisputed) “But the note is up to me to be paid

now.” (Tr. p. 47, bottom.) It was in the hands of a lawyer at Fairbanks at the time of the trial. (Tr. p. 42, 12th line from bottom.)

Counsel would have it that the Allberg note “was surrendered to him (Weber) and was in the possession of his attorney during the trial”. (Plaintiff’s Brief, p. 23.) There is absolutely no evidence that the Allberg note was surrendered to Weber or is or ever was in his possession. He says that the note is in possession of Mr. Roth (Tr. p. 42) but he does not say or intimate that Roth is holding note *for him*. Roth is a practicing attorney at Fairbanks and it does not appear that Weber is his only client or that he is attorney for Weber except in the matter of the action at bar. For all that appears Roth is holding the note as attorney for Allberg or for some other client or obtained it from some other attorney. There is certainly no evidence that Roth holds the note as attorney for Weber. As the note was never paid and as there is no evidence that Roth is not Allberg’s attorney to collect that very note or that he did not get the note from some other attorney or person, the inference (which is sought to be conveyed) that the note is in defendant’s possession by virtue of being in Roth’s possession has no foundation in the evidence on which it can rest—and especially is this true when it is remembered that Weber testified that “the note is up to me to be paid now” and there is no contradiction on that point.

But irrespective of this: The note is an unconditional *written* promise to pay at a time certain. The consideration was the indebtedness of Petree to Weber and this was a good consideration. No *parol* evidence can graft upon the *written* contract any condition as to time of payment other than that which appears in the writing.

This is substantive law, not a mere rule of evidence (22 C. J. p. 1075 and cases cited in Note 50) and hence it is immaterial whether such evidence was or was not objected to.—for the law does not allow such evidence to have any probative force. (Pittcairn v. Phillips Hiss Co., 125 Fed 110-113.)

Hence the lower court was correct in directing a verdict on the counterclaim.

We respectfully submit that the judgment should be affirmed.

Dated, San Francisco,

November 26, 1923.

R. F. ROTH,

Attorney for Defendant in Error.

ROBERT W. JENNINGS,

Of Counsel.

In the
**United States Circuit Court
of Appeals**
For the Ninth Circuit

BLANCHE CASCADEN, as administratrix of the
estate of DAVID H. CASCADEN, deceased,
(substituted plaintiff for DAVID H. CASCA-
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vs.

GEORGE WEBER, *Defendant in Error*

Reply Brief of Plaintiff in Error

Upon Writ of Error to the United States District Court
of the Territory of Alaska, Fourth Division

JOHN A. CLARK

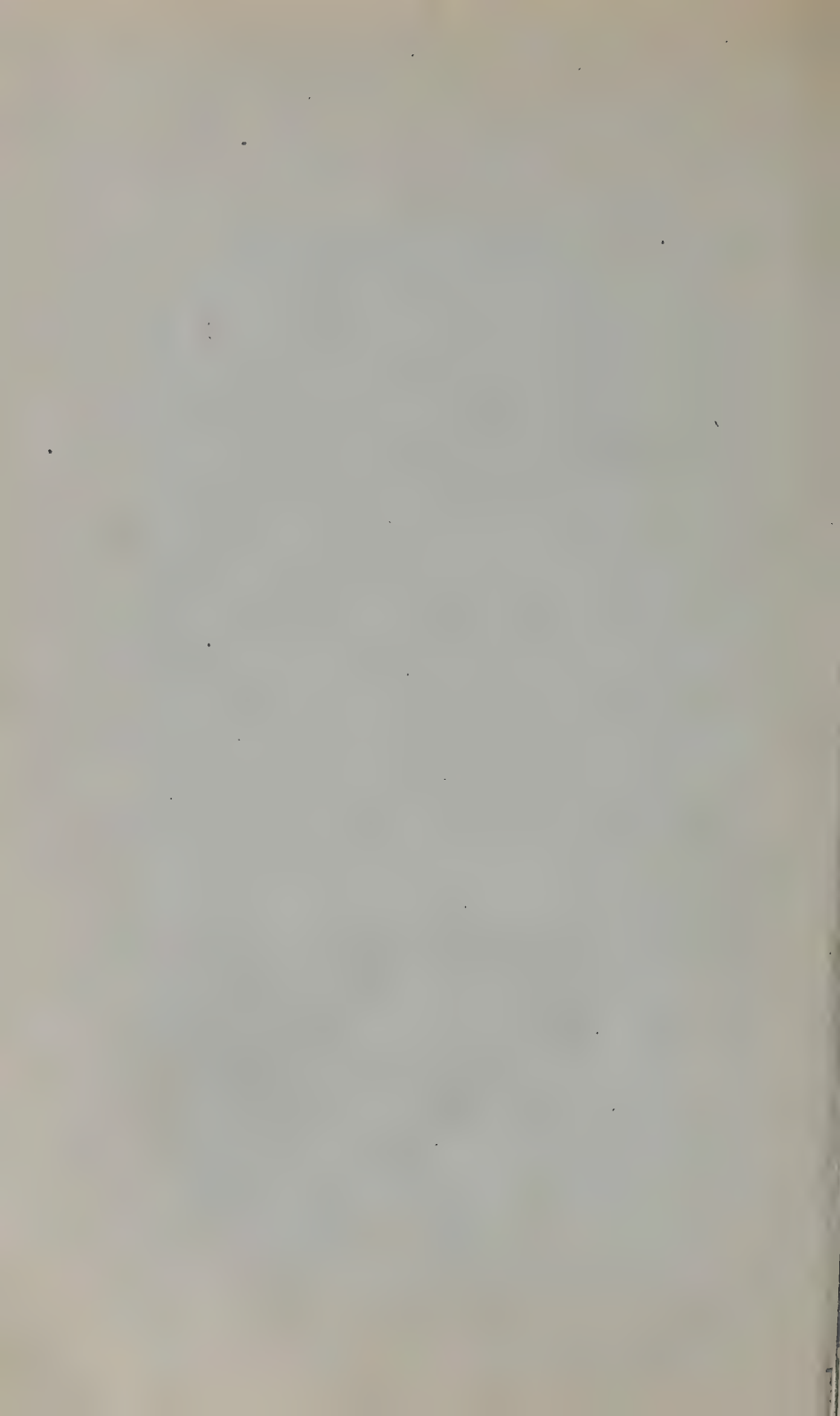
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Upon Writ of Error to the United States District Court
of the Territory of Alaska, Fourth Division

Defendant on page 1 of his brief, says:

“On page 4 of plaintiff’s brief occurs this state-
ment:

“ ‘But the latter note was given plaintiff in error
merely as security for the payment of the \$3000
note.’ This is plaintiff’s contention but the conten-
tion is not supported by any evidence.”

There is no evidence in the record that the Fairbanks Beverage Company note was given as absolute payment of the bank note which Cascaden paid, and in the absence of such evidence, the law presumes that such note was given Cascaden as security for the disbursement made by him in paying the bank note on which he was merely surety.

“There is no doubt that a negotiable bill or note given for or on account of a contemporaneous or pre-existing debt, and whether or not it be in renewal of a previous bill or note, suspends all right of action on such debt during its currency—that is, until it is dishonored by non-acceptance or non-payment. If this were not so, the creditor who took the additional security, in the form of a bill or note, might in consequence of its negotiable character, transfer it to a bona fide holder and subject the debtor to payment of both the original and the new debt.

“But as soon as the bill or note is dishonored, the original debt revives and the creditor may pursue his remedy for it, or sue upon the bill or note. The bill or note taken in conditional payment becomes by its dishonor a collateral security, which the creditor may retain and endeavor to collect without forfeiting the right to proceed in the principal cause of action, subject to the obligation of surrendering up the bill or note at the trial.”

Daniel on Negotiable Instruments, (4th Ed.),
Vol. 2, Sec. 1272.

Keyser v. Hinkle, 106 S. W. 98 at 101.
Black v. Sippy, 16 Pac. 418 at 419.
8 C. J., Sec. 793, pp. 569-572 incl.

We wish to call the attention of the court to an erroneous citation on page 13 of our original brief. The citation should be 8 Corpus Juris, section 794, page 572, instead of page 996.

Defendant, pages 1 and 2 of his brief, states:

“And on page 5 of plaintiff’s brief occurs this statement:

“ ‘But that note was given the defendant in error to indemnify him against liability on a note of one Frank Allberg against defendant in error and one David Petree.’

“The evidence shows that the \$2000 note was given for money owed by Petree to Weber and that Cascaden was a co-maker. There is no evidence that the note was not to be paid unless or until Weber paid the Allberg note.”

Plaintiff testified without objection (Tr. 71), in response to the following questions:

“Q. What does that say?

“A. Well, I have \$3000 Weber and Petree; \$3000 paid afterwards Dave Cascaden; \$3000 still due Allberg. \$2000 was to secure George in 1918, February 6th, when he left for outside, against balance of \$3000 note to Allberg. Firm was to pay Allberg \$3000 but has nothing to show.

“Q. Directing your attention to this part of the memorandum that says ‘\$2000 was to secure George in 1918, February 6th, when left for the outside, against balance of \$3000 note to Allberg.’ Did Mr. Weber make that statement to you at that time?

“A. He did, Mr. Clark.

“Q. And you were referring to that \$2000 note that he has set up in his answer in this case?

“A. Yes, sir; that is the note.”

Plaintiff made a memorandum of the conversation that she had with the defendant in the spring of 1922, relative to the \$2000 note pleaded as counter-claim (Tr. 70), and the plaintiff testified from such memorandum without objection.

For the purpose of determining whether or not the court erred in directing a verdict in favor of the defendant on the counter-claim, plaintiff's testimony regarding defendant's admissions and declarations must be accepted as true. What did defendant mean when he said: “The \$2000 note was given to me to secure me against balance of \$3000 note due Allberg”?

Manifestly, to secure him against liability on the Allberg note, that is, if he were compelled to pay the Allberg note, he would be reimbursed by Petree and Cascaden to the extent of the \$2000 note pleaded

by defendant as a counter-claim. We will discuss this matter more at length in reply to the portion of defendant's brief which deals specifically with plaintiff's defense to defendant's counterclaim.

Defendant contends (brief, pages 2-6), that defendant's exhibit 7 (Tr. 128, 129 and 130), shows that Cascaden accepted the Beverage Company note as absolute payment of the bank note which Cascaden paid, and defendant further asserts (brief, pages 5 and 6), that exhibit 7 makes the verity of four propositions, which he enumerates (brief, pages 5 and 6), apparent. But there is no evidence in the record that there was any agreement or understanding at any time between the defendant and Cascaden, or between Cascaden and the Beverage Company, that the latter's note should be accepted by the former as absolute payment of the bank note. The fact that the Beverage Company note was secured by mortgage is no evidence that the same was accepted by Cascaden as absolute payment.

8 C. J., Sec. 793, pp. 569-572.

Reynolds v. Schade, 109 S. W. 629.

It is true the Beverage Company was interested in the release of the mortgage which secured the payment of the bank note. It was not, however, financially interested in the payment of that note, be-

cause it was not liable for its payment. But in order to procure an additional loan from Cascaden, and the discharge of the mortgage securing the bank note, it was willing to give a note secured by first mortgage for the loan to be obtained from Cascaden, and a note secured by second mortgage for the amount of the bank note. Such attitude by the Beverage Company and Cascaden is no evidence that there was any understanding or agreement between them that the latter would accept the Beverage Company note secured by second mortgage as absolute payment of defendant's liability to him on the bank note. Such transaction is entirely consistent with an understanding that Cascaden should retain the bank note and hold the makers, Petree and the defendant, liable for the amount of the principal and interest he had paid thereon, in case he should not be able to collect the Beverage Company note given him for the same debt. Nor does the financing of the Beverage Company by Cascaden evidence any intention on the part of Cascaden or the company that Cascaden should release the defendant and Petree or either of them from their liability to him for the amount paid by him to the bank, unless the Beverage Company should pay its note which was secured by second mortgage. The

fact that the amount of that note was to be and was secured by second mortgage indicates a contrary intent, particularly in the light of the fact that Cascaden did not surrender the bank note to the makers, Petree and defendant. If the Beverage Company and Cascaden didn't consider that Petree's and the defendant's liability to Cascaden on account of the latter having paid the bank note was some security for such obligation, then why was not that debt to Cascaden included with the loan that Cascaden was to make the company, and the aggregate sum secured by one mortgage? Nor does the resolution provide for his surrender of the bank note to the principal makers or to the Beverage Company.

Defendant on page 7 of his brief, says that Cascaden paid the bank note before maturity. The record, however, shows that he did not pay the note until after maturity. That note, with the extension granted thereon, matured June 30, 1918, as stated on page 3 of defendant's brief. Plaintiff alleges in her complaint (par. V, Tr. 6 and 7), that defendant did not pay the note when it matured, and that thereafter, on the 25th day of June, 1918, Cascaden paid the note. In reply to such allegation, the defendant in the second paragraph of his amended

answer (Tr. 11), admits that Cascaden paid the note to the bank, but denies that he paid it at maturity or at any time prior to July 3, 1918. As further evidence that Cascaden did not pay the note before maturity, we call the court's attention to the fact that the Beverage Company's note to Cascaden is dated July 3, 1918. (Tr. 97.) The amount of the latter note is \$3033.00, instead of \$3030.00, which would have been the correct amount to reimburse Cascaden had he paid the bank note and interest at or before maturity, since the interest on the bank note is \$30.00 per month. (Tr. 6.) It is evident that the plaintiff erred in her allegation that payment of the note was made on the 25th of June, 1918, because the note had not matured on that date, and she alleges in the same paragraph that it was not paid until after maturity. She obviously erred in her recollection as to the date of maturity. It is apparent, however, from the record, that Cascaden paid the bank note after the same matured, but before the Beverage Company executed its note to him, for the defendant testified (Tr. 29 and 30):

"A. Mr. Cascaden came up to the bottling works one day and he said: 'You will make out a note to me and a mortgage, I paid the note to the Farmers' Bank.' Mr. St. George stopped him on the street

and asked him about it, and he got sore about it and he paid it, and we transferred a mortgage on the bottling works to Mr. Cascaden then."

Defendant asserts (brief, pages 7 and 8), that plaintiff has mistaken her remedy as to her first cause of action, that her remedy as to that cause of action is an action on a contract of indemnity which the law implies, from the relation between the accommodating party and the part accommodated, but even if the contention of defendant in that respect be technically tenable, it can not be invoked for the first time in this court, because no objection was raised to the sufficiency of the allegations of the complaint, by demurrer or otherwise, in the trial court, and the complaint does state facts sufficient to constitute a cause of action on such implied contract of indemnity.

In *McDonough v. Nowlin*, 118 Pac. 463, at page 465, the court said:

"The complaint is somewhat ambiguous and uncertain in this regard, and had the defendant raised the point by demurrer, no doubt the complaint would have been amended so as to remove any ambiguity or uncertainty in the pleading.

"It was said in the case cited:

" 'Under our system of pleading, where all the facts of the transaction are set out, it can make

little difference in the generality of cases whether it be said that an accommodation maker or endorser who has been compelled to meet the obligation of his principal is entitled to sue upon the note, with a recovery limited to the amount he has expended, with legal interest, or whether it be said that his action is an assumpsit for money laid out on behalf of his principal and that his recovery is measured by the amount he has so expended, with legal interest.'

"The facts of the transaction are set out in the present case with sufficient fullness to support a judgment under the rule laid down in *Yule v. Bishop*, *supra*.

"The finding of the court that plaintiffs are the owners and holders of a promissory note and are entitled to judgment against defendant therefor was a superfluous and unnecessary finding. The other findings of fact are supported by the evidence and are sufficient to support the judgment."

In the case at bar the complaint alleges that the defendant, is the principal on the note, that Cascaden was a mere surety, that he was compelled to pay the note to the payee after maturity, that the defendant had not reimbursed him for the amount or any portion thereof that he had paid on the note. We submit that such a statement of facts, in the absence of any objection to the pleadings in the trial court, is sufficient to entitle plaintiff to a judgment on the implied relationship existing between a surety and a principal on a note.

Defendant states on page 9 of his brief, that the bank note was paid before maturity by the Beverage Company by and through Cascaden, and the note was delivered to the company's vice president, Cascaden. But, as we have shown, Cascaden paid the note after maturity and before he received the note for the same sum from the Beverage Company. Nor was the note delivered to the Beverage Company. Plaintiff testified that she found the note in Mr. Cascaden's private safety deposit box, and not among any papers belonging to the Beverage Company. (Tr. 79, 80.) The note was evidently placed in such safety deposit box before Cascaden was adjudged insane, which occurred on the 6th day of September, 1921 (Tr. 4, 5), and this action was not commenced until May 31, 1922. (Tr. 10.)

Why should the bank note have been delivered to the Beverage Company if it was by the parties considered paid by the giving of the Beverage Company note as contended by defendant? If such were the agreement or understanding between the parties, it should have been surrendered to the original makers, Petree and defendant.

Defendant says (brief page 11):

"If anyone has a right of action against Petree or Weber it is the Beverage Company—not Cascaden."

If such contention be tenable, then there must have been no agreement between Cascaden, defendant and the Beverage Company that the giving of the Beverage Company note to Cascaden was absolute payment of the obligation of Petree and defendant to Cascaden on account of the latter having paid the bank note.

In the absence of such an agreement or understanding the Beverage Company note must be considered only as conditional payment or additional security for the payment of Petree's and defendant's obligation to Cascaden, as insisted by plaintiff in her original brief (pages 27-31), where numerous authorities are cited which sustain her contention.

DEFENDANT'S COUNTER-CLAIM

On page 12 of his brief, defendant states:

"Weber (defendant) swore that this note was given to him by Petree for a bona fide indebtedness of Petree to him and that Petree induced Cascaden to join him as co-maker; that the note is due and has not been paid. (Tr. pp. 35, 36, 37.) This evidence is entirely uncontradicted."

We submit that defendant's testimony above referred to is contradicted by defendant's own admis-

sions to plaintiff (Tr. 71), and in support of such testimony the defendant testified as follows (Tr. 46, 47) :

“Q. If you had asked for it? Why were you speaking about needing protection?

“A. Well, I told Mrs. Cascaden there was still three thousand dollars to be paid, and the firm took that debt over and put it on the books, but they never issued any security for it, and it is up to me to pay that. The way we started to talk about it at that time, Mrs. Cascaden came across to my gate and said, ‘You know, Mr. Weber, Mr. Cascaden wanted me to deed your interest back to you after it is all settled and sold’—”

It is true the defendant doesn’t state what firm was to assume the balance of the Allberg indebtedness, but it is fair to assume that the firm referred to was the Beverage Company, which was not organized at that time, but the parties at the time contemplated organizing such company. Defendant testified (Tr. 36) :

“Q. But how did that note come to be given?

“A. I went outside—I left Fairbanks on the 6th of February.

“Q. What year?

“A. ’18.

“Q. 1918?

"A. Yes, sir. I went to an institution in Milwaukee for brewers, who were scientific brewing companies. It was a short course on account of members all knowing their business, and they said they would teach all the methods of improving near-beer, and how to change a brewery plant, adapt it to the new methods we had to use in order to keep it going, and they decided I go out and take that course, and incidentally I bought some stuff and looked around. And on the day before I left, why, they figured up how we stood about our transaction with Mr. Petree and myself about shipping in that stuff and buying the bottling works, and Mr. Petree gave me that note."

And defendant again testified (Tr. 48):

"Q. You didn't ask Mr. Petree for any security for that note?

"A. No, because I thought it would be settled when they reorganized."

To whom does the defendant refer when he says "they decided I go out and take that course?" Evidently to Petree and Cascaden. Those three were the only parties interested in the organization of the Beverage Company, and such is the only reasonable interpretation to place upon the evidence in the record. The defendant testified that the company was to assume the Allberg note for \$3000, but before the company was organized each one of the three members was willing to obligate himself to the

extent of one-third of the balance of the indebtedness to Allberg. Therefore, when defendant was coming outside he wanted a note from Petree and Cascaden for \$2000 to indemnify him in case he was compelled to pay the Allberg note while he was outside.

It is clear that in contemplation of the organization of the Beverage Company and the assumption of the balance of the Allberg indebtedness by that company, Cascaden and Petree were willing to and did sign and deliver the \$2000 note to the defendant to protect him against any sum he might be called upon to pay Allberg when he came outside, as defendant testified (Tr. 43), that he expected to meet Allberg when he came outside, and that Allberg would very likely endeavor to collect from him the balance due Allberg from Petree and the defendant. The testimony of the plaintiff to the effect that the defendant stated to her that the \$2000 note was given defendant to secure him against liability on the Allberg note is abundantly corroborated by the testimony of the defendant and the facts and circumstances surrounding the transactions between Petree, defendant and Cascaden.

Defendant claims in his brief (page 10), that even if it be conceded that the \$2000 note was

given defendant to secure him against liability on the Allberg note, that the latter note is still an outstanding obligation against defendant, as he says that note has never been delivered to him, although his counsel had such note in his possession at the time of the trial of this action.

We submit that the language of the admission of the defendant as testified to by plaintiff can have no other meaning than that Petree and Cascaden should not be liable to defendant on the \$2000 note unless and until the latter should pay the Allberg note. Such interpretation of the defendant's admission is borne out by the defendant's testimony that the firm assumed that indebtedness. (Tr. 46, 47.) In any event the question was one of fact for the jury to answer, under all the facts and circumstances disclosed by the evidence.

We insist that the evidence shows that the Allberg note had been surrendered to the defendant prior to the trial, and that it was in his possession at that time. Defendant testified (Tr. 42), that the Allberg note had not been paid and that the note was then in the possession of his counsel, Mr. Roth, and the latter stated near the close of the trial (Tr. 82), that the Allberg note was then in his (Roth's) possession.

Defendant contends in his brief (pages 15 and 16), that such admissions by himself and his counsel as to the latter's possession of the Allberg note are not proof that the note had been surrendered to defendant, because defendant insists that his counsel might be holding the note for collection. If such were the fact, it is safe to assume that both defendant and his counsel would have so testified. Their silence on that proposition warrants the inference that Mr. Roth was holding the note for defendant. They were both in court at the time of the trial. The man against whose estate the defendant was endeavoring to recover a judgment was in a hospital for the insane, more than 2000 miles from the place of trial. Common honesty should have prompted the defendant to acquaint the court and jury with all the material facts in his possession. If he failed to do so, doubtful questions of fact should not be interpreted in his favor. The Alaskan Statute, section 1505, Compiled Laws of the Territory of Alaska, 1913, provides among other things:

“Sixth. That evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict; and therefore

“Seventh. That if the weaker and less satisfactory evidence is offered, when it appears that strong-

er and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust."

The foregoing section of the statute is certainly applicable to the testimony of the defendant in the case at bar. He was the one person of all others who was in a position to recite in detail the history of all of the transactions between himself and Cascaden. As the record discloses, the plaintiff was under the disadvantage of being compelled to rely on whatever records of her husband's she could find, and on the admissions and declarations made by the defendant before the trial.

Defendant's last contention is that the note pleaded by him as a counter-claim is an unconditional written promise to pay at a certain time, and that no parole evidence can graft upon a written contract any condition as to the time of payment, other than that which appears in the writing. We insist, however, that the oral evidence was not offered or received for the purpose of adding to or varying any of the terms of the note, but such evidence was offered and received to explain why such note was given, and parole evidence is always admissible for such purpose.

22 C. J., Sec. 1559, p. 1164.

The evidence in the record shows that the \$2000 note was merely given to the defendant by Casca-den and Petree to indemnify the defendant against liability on the Allberg note. A bond might have been given for the same purpose, but evidently the giving of the note seemed a simpler method for the protection of the defendant.

We respectfully submit that the judgment of the trial court should be set aside and a new trial granted.

JOHN A. CLARK,
Of Fairbanks, Alaska,
and
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920 Alaska Building, Seattle, Washington,
Attorneys for Plaintiff in Error.

No. 4093

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BLANCHE CASCADEN, as administratrix of
the estate of David H. Cascaden, de-
ceased, substituted plaintiff for David
H. Cascaden and Blanche Cascaden,
as guardian of the estate of David H.
Cascaden, an insane person,

Plaintiff in Error,

VS.

GEORGE WEBER,

Defendant in Error.

PETITION OF DEFENDANT IN ERROR FOR A REHEARING
OF DECISION ON COUNTERCLAIM.

R. F. ROTH,

Alaska,

ROBERT W. JENNINGS,

Mills Building, San Francisco,

*Attorneys for Defendant in Error
and Petitioner.*

FILED
JUL 1 1904
U. S. DISTRICT COURT
SAN FRANCISCO

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PETITION OF DEFENDANT IN ERROR FOR A REHEARING OF DECISION ON COUNTERCLAIM.

*To the Honorable William B. Gilbert, Presiding
Judge, and the Associate Judges of the United
States Circuit Court of Appeals for the Ninth
Circuit:*

Defendant in error respectfully petitions this court for a rehearing hereof insofar as the decision on the counterclaim is concerned, and begs leave to submit the following:

The making, execution, and delivery by Cascaden and Petree of the two thousand (\$2,000) dollar note to Weber is admitted in the pleadings (Tr. p. 18), but it is affirmatively alleged (1) that there was no consideration, (2) that the consideration failed (Tr. pp. 18 and 19).

The *burden* then was on Cascaden *to introduce evidence* tending to sustain one or the other of these defenses. We submit that there was no evidence to sustain either defense.

No evidence of no consideration.

The first mention in the evidence of the two thousand (\$2,000) dollar note is on page No. 35 of the record. This was on the direct examination of Weber. On that examination (pages 35, 36 and 37 of the Tr.), there is certainly *nothing tending to show no consideration*. Weber is asked by his counsel to "explain that note", and he explains it, and the sum total of the explanation is found on p. 37 of the Tr. viz.:

"Q. Then, as I understand, before you left you and Petree figured up the business between you? A. Yes.

Q. And this note was the evidence of how you and Petree stood at that time personally? A. Yes sir."

Plaintiff relies on the cross-examination of Weber, but we submit that the cross-examination does not tend in the slightest degree to show that there was

no consideration. That cross-examination develops the fact that Weber was the practical brewer and that he left the financial matters, even his own interests, to Petree and Cascaden, in whom he had full confidence. He is the one who was sent “outside” to learn the “new process” (Tr. p. 36), and he says:

“I didn’t keep any track of my accounts. I had my head full of changing the business from one to the other, *and I had full confidence in Mr. Petree and Mr. Cascaden*, personally and financially. That time I didn’t know how Mr. Petree stood.

Q. And Mr. Petree had enough confidence, did he, in letting you just take the figures out of your head, and saying ‘You owe me two thousand dollars’, and he gave you that note?

A. *It was Mr. Petree’s, not mine*” (Tr. p. 48).

The cross-examination developed the fact that Weber was unused to business, and unused to the witness stand, but it also developed that he was essentially honest and without guile, for otherwise he could easily have manufactured another consideration, as both Petree and Cascaden were dead.

We know that Petree owed Weber money (Tr. p. 64), and even if it be conceded, for the sake of the argument, that Weber was “shaken all to pieces”, that he was shown to be falsifying—that what he says was the consideration *was not the consideration*, still that would be very far from saying that there was evidence that there was *no considera-*

tion; and yet, unless the maker of the note produces evidence that there was *no* consideration, evidence as to the existence of a *particular* consideration, however weak and unsatisfactory it may be, will not avail; for *there is the note* in the hands of the payee—no suspicion that he came by it dishonestly—*there is the signature, there is the promise, there is the unrebutted presumption of consideration*, which must obtain in the absence of evidence *to the contrary*. The “contrary” is “no” consideration, not simply “not that” consideration.

The payee of a note, (the possession of which by him is not impugned), might not be able to give any coherent account of the transactions leading up to it; the account which he does give of the consideration may be weak and unsatisfactory, wildly extravagant, palpably untrue, clearly impossible, still that fact would be evidence only of the falsity of that particular account. It would be no evidence of the *non-existence of a true account* showing consideration.

If this cause had been submitted to the jury and they had found specifically “no consideration”, upon what evidence could such a finding be said to be based? The jury could only say, “Weber’s testimony as to what was the consideration was weak and unsatisfactory, and Cascaden and Petree, the makers of the note, are both dead; therefore, we find that the preponderance of evidence is that

there was *no* consideration''. And this, notwithstanding the fact that men do not usually sign and deliver notes for two thousand (\$2000) dollars without consideration, notwithstanding possession of the note by the payee—a possession unaccompanied by any suspicious circumstances—and notwithstanding the well known presumption of law.

That plaintiff did not consider the testimony of Weber as to a *particular* consideration as being evidence of *no* consideration, is shown by the fact that he relies on Weber's alleged admissions as showing that there *was* another consideration—a consideration which, it is claimed, has failed.

Cascaden and Petree are both dead, it is true, but this is not a case of the living taking advantage of the fact that the lips of the responsible maker of the note are closed by death. It would seem, rather, that the representatives of the dead are seeking to "put something over" on the living. The suit is brought on notes due June 25, 1918, and December 25, 1918, respectively. Cascaden was not declared insane until August 26, 1921. If he had thought he had a good cause of action on either note, it is not to be presumed that he would have forborne for three years to take legal measures to collect. He made no effort to collect during his sanity, but his guardian, finding the notes among his papers, begins this suit, notwithstanding the fact that the resolutions of the Beverage Company, signed by Cascaden, show clearly that there is no

cause of action on the three thousand (\$3000) dollar note.

Failure of consideration. No evidence.

On this defense the only evidence is that Mrs. Cascaden said that Weber admitted to her:

“Two thousand (\$2000) dollars was to secure George in 1918, February 6th, when he left for outside against a balance of three thousand (\$3000) dollars, note due Ahlberg” (Tr. p. 71),

and that Weber’s denial of having made that omission is “weak and unsatisfactory.”

Let it be conceded as a fact that Weber made that admission in the very words used by Mrs. Cascaden. The Alaska Code provides that the jury must be instructed that the oral admissions of a party are to be received with caution (C. L. A. 1913, Sec. 1505, Sub. 4), and surely, an oral admission is not to be construed to mean anything beyond what its language expresses or obviously implies.

If this was the consideration, it was a good consideration, and there is no testimony that it has failed. If it means (and in the nature of things it could mean nothing else), that Weber was liable (as between him and Petree and Cascaden), for only one-third of the three thousand (\$3000) dollar Allberg note and that the two thousand (\$2000) dollar note was given to protect him against being compelled to pay the whole of the Allberg note, then the consideration, so far from failing, is very much alive, because that liability is not at an end—

the Allberg note is still unpaid and Weber is liable for the whole of it (Defendants' Brief, pp. 15 and 16).

We submit then, that there was *no* evidence of *no* consideration and *no* evidence of failure of consideration, and so nothing for the jury to pass on.

COSTS.

If the petition for rehearing should be denied, then defendant in error asks this court to make an order apportioning between the parties the costs of the appellate proceeding, for the following reason:

The gist of this court's decision is that the ruling of the lower court is affirmed as to the first cause of action, which involves three thousand thirty-three (\$3033) dollars, but reversed as to the counterclaim, which involves one thousand five hundred (\$1500) dollars. The case is remanded for a new trial, on the counterclaim only.

The printed record embraces 197 pages (including covers), costing two hundred and eighty-two dollars and forty (\$282.40) cents, and the charge of the clerk of the lower court for preparing the transcript was seventy dollars and fifty-five (\$70.55) cents.

Approximately one-half of these items was for matter which relates exclusively to the first cause of action.

It is submitted that defendant in error ought not to be taxed with that portion of the costs which

pertains solely to the first cause of action, on which he prevailed. Instead of bringing separate action, as he might have done, on the counterclaim, he chose, in the interest of lessened expense and annoyance, to try it all in one suit. For this he ought not to be penalized.

Dated, San Francisco,
January 9, 1924.

Respectfully submitted,
R. F. ROTH,
ROBERT W. JENNINGS,
*Attorneys for Defendant in Error
and Petitioner.*

I hereby certify that in my opinion the above and foregoing petition is well founded, and is not interposed for delay.

Dated, San Francisco,
January 9, 1924.

ROBERT W. JENNINGS,
*Attorney for Defendant in Error
and Petitioner.* ^{JC}

